The True Woman: Scenes From the Law of Self-Defense

THE TRUE WOMAN: SCENES FROM THE LAW OF SELF-DEFENSE

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Self-defense is undergoing an epochal transformation.[1] Since 2005, more than forty states have passed or proposed new "Castle Doctrine" legislation intended to expand the right to use deadly force in self-defense.[2] These bills derive their informal name from the traditional common law castle doctrine, which grants a person attacked in his own home the right to use deadly force without trying to retreat to safety.[3] But the new "Castle Doctrine" statutes, conceived and advocated by the National Rifle Association,[4] extend beyond the home to self-defense more broadly. They

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[1] *See, e.g.*, Adam Liptak, *15 States Expand Right to Shoot in Self-Defense*, N.Y. TIMES, Aug. 7, 2006, at A1.

[2] *See, e.g.*, FLA. STAT. ANN. § 776.013 (West 2005 & Supp. 2008). *See also infra* notes 159–63 (citing statutes).

[3] The castle doctrine has been "universally recognized" in those jurisdictions that have the general duty to retreat. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 18.02[C][3], at 245 (4th ed. 2006).

[4] *See* Manuel Roig-Franzia, *Fla. Gun Law to Expand Leeway for Self-Defense*, WASH. POST, Apr. 26, 2005, at A1 (noting the role of former NRA president Marion P. Hammer). In this article, I use "castle doctrine" to refer to the common law rule, and "Castle Doctrine" to refer to the new statutes passed since 2005.

purport to change existing self-defense law in one or both of the following ways: First, they permit a home resident to kill an intruder, by presuming rather than requiring proof of reasonable fear of death or serious bodily harm;[5] second, they reject a general duty to retreat from attack, even when retreat is possible, not only in the home, but also in public space.[6]

This Article sets out to explicate, contextualize, and theorize this remarkable development in self-defense law, which has not yet received a thorough analysis in the criminal law literature.[7] To do so, the Article investigates the ideas that shape these new Castle Doctrine laws. It offers an interpretive genealogy focused on three crucial turning points in the development of self-defense, and argues that each has left a defining ideological trace on the new laws. The central claim is that in each phase, self-defense law drew importantly but differently on the idea of the home; and, in each, the operative idea of the home was constituted specifically by gender roles therein. The Article shows that modern self-defense law exemplified by the new Castle Doctrine powerfully embeds these distinctive meanings of gender, home, and crime.

Part I begins with the common law castle doctrine that gives its name to the new Castle Doctrine laws, and which in turn gets its name from the old adage that a man's house is his castle.[8] Though often invoked in the context

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[5] For example, Florida's law provides:

> A person is presumed to have held a reasonable fear of imminent peril of death . . . when using defensive force that is intended or likely to cause death or great bodily harm to another if:
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> (a) The person against whom the defensive force was used . . . unlawfully and forcibly entered a dwelling, residence, or occupied vehicle . . . ; and
>
> (b) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

FLA. STAT. ANN. § 776.013(1) (West 2005 & Supp. 2008).

[6] In this regard, Florida's law provides:

> A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony.

Id. § 776.013(3).

[7] *But cf.* Christine Catalfamo, *Stand Your Ground: Florida's Castle Doctrine for the Twenty-First Century*, 4 RUTGERS J.L. & PUB. POL'Y 504 (2007); Judith E. Koons, *Gunsmoke and Legal Mirrors: Women Surviving Intimate Battery and Deadly Legal Doctrines*, 14 J.L. & POL'Y 617 (2006); Daniel Michael, *Florida's Protection of Persons Bill*, 43 HARV. J. ON LEGIS. 199 (2006).

[8] *See* 3 WILLIAM BLACKSTONE, COMMENTARIES *288 ("[E]very man's house is looked upon by the law to be his castle."); E. COKE, THE THIRD PART OF THE INSTITUTE OF THE LAWS OF ENGLAND *162 ("A man's house is his castle—for where shall a man be safe if it be not in his house?").

of modern constitutional privacy,[9] the adage has an older meaning in substantive criminal law. Referring to the castle's function as a fortress against hostile invasion and as a physical stronghold from which to repel territorial attack in warfare, the castle doctrine embodies the common law idea that in his home, a man may forcefully defend himself, his family, and his property against harm by others.[10]

I argue that the common law castle doctrine embodied a view of crime as boundary-crossing.[11] Within the home and nowhere else, the common law recognized the right of the home resident—archetypally a man defending his family—to use deadly force to repel the intruder, without obligation to retreat. An intruder who invaded the house of another man, and thereby threatened his home and family, crossed the boundary of the lawful, and thus moved beyond the protection of the law, into a realm that suspended the restrictions on violence. This old idea of the home has become the rallying cry of the contemporary Castle Doctrine movement.

Having sketched the common law background, I describe the first major turning point in self-defense law. This is the late nineteenth-century transformation wherein, breaking with English common law, a majority of state courts abandoned the duty to retreat generally in public space. American judges translated the traditional authorization to use deadly force in the home into the right of the "true man" to defend himself without fleeing wherever he had a right to be—not only in the home, but in all public space. I argue that this judicial extension of the right not to retreat was accomplished by drawing upon a notion of manhood specifically in the sense of a man's proper role in the home to provide for and protect his wife and children.

Part II then charts the second major turning point. Late twentieth-century legal feminism pushed courts to recognize domestic violence ("DV") as a prevalent crime. Courts confronting self-defense claims of battered women who had killed their abusers engaged in an important conceptual revision. I show that though it was plausible simply to apply the traditional castle doctrine and thus relieve the battered woman from the duty to retreat from attack in her home, feminist-influenced courts gave effect to an altogether different view of the home. A battered woman was permitted to kill without retreating, not because of a right that she had there, but because she lacked the capacity to retreat. I argue that the castle was revised

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[9] *See, e.g.*, Georgia v. Randolph, 547 U.S. 103, 115 (2006); Minnesota v. Carter, 525 U.S. 83, 94 (1998) (Scalia, J., concurring); Payton v. New York, 445 U.S. 573, 596–97 (1980).

[10] *See* Semayne's Case, (1604) 77 Eng. Rep. 194, 195 (K.B.) ("[T]he house of every one is to him as his . . . castle and fortress, as well as his defence against injury and violence, as for his repose.").

[11] *Cf.* Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 22–24 (2006) (discussing burglary as "boundary-crossing crime," and the home as "a spatial metaphor of private refuge from crime" whose "sacredness and inviolability consist not only in the integrity of its boundary but also in the freedom from crime within").

from a stronghold against invaders into a prison where the woman was subordinated by the man of the castle. In this vision, the home was a space of subordination, and crime was subordination in the form of violence.

Against the backdrop of these different constructions of the home and of crime, Part III addresses the third turning point, which is still under way: the new Castle Doctrine laws that have spread throughout the country since 2005. The Castle Doctrine laws once again champion and foreground the common law "true man" ideal along with the corresponding picture of the criminal as territorial invader. But the modern Castle Doctrine also bears the unmistakable traces of the subordinated woman, now an indelible presence in the self-defense terrain and in public understandings of crime. A key feature of the new self-defense laws is permission to treat a cohabitant as an intruder if a DV protection order commands him to stay away from the home. The new Castle Doctrine thereby embeds DV within the home invasion paradigm. The result is a distinctive and perhaps uneasy hybrid of the true man and the subordinated woman, which I call the "true woman." I argue that the modern Castle Doctrine leverages the subordinated woman into a general model of self-defense rooted in the imperative to protect the home and family from attack.

I conclude with reflections on the increasing emphasis we see today on protecting the home from violence—despite the nationwide drop in rates of violent crime. At a time when we face anxiety about the security of the "homeland" against attack by terrorists—foreign men out to kill innocent women and children—citizens in our states seem preoccupied with the home as a place of vulnerability. It may be that post-September 11 anxiety about terrorism finds indirect expression in laws shoring up home residents' security against home intrusion. The wish to arm ourselves against attack in the home may express the desire to secure our national borders, and may reflect anxiety about our inability to protect against terrorism. The unspoken fantasy is that the combination of bearing arms and more expansive self-defense laws can protect families against enemies, both foreign and domestic.

I. The True Man

A. The General Duty to Retreat and the Castle Doctrine

In the English common law, a person involved in a life-threatening altercation in a public place could resort to deadly force to defend his life only

after attempting to retreat as far as possible.[12] Homicide in self-defense was permitted once he had fulfilled this duty to retreat.[13]

Underlying the duty to retreat was the theory that the Crown had a monopoly on violence, and thus individual subjects should attempt to resolve their disputes in peace. As Hale put it in 1678,

> in cases of hostility between two nations it is a reproach and piece of cowardice to fly from an enemy, yet in cases of assaults and affrays between subjects under the same law, the law owns not any such point of honour, because the king and his laws are to be the *vindices injuriarum*, and private persons are not trusted to take capital revenge one of another.[14]

A century later, Blackstone echoed this view:

> [T]he law requires, that the person, who kills another in his own defence, should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant; and that, not fictitiously, or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood. And though it may be cowardice, in time of war between two independent nations, to flee from an enemy; yet between two fellow subjects the law countenances no such point of honour: Because the king and his courts are the *vindices injuriarum*, and will give to the party wronged all the satisfaction he deserves.[15]

The distinction between the king and his subjects, and, consequently, the distinction between violence among nations and violence among individuals, entailed a general duty to retreat from another person's attack before killing, a duty that did not exist in warfare.

The same common law that imposed a duty to retreat for assault in public space treated incursions into the home differently. According to Blackstone, "the law of England has so particular and tender a regard to the immunity of a man's house, that it stiles it his castle, and will never suffer it to be violated with impunity."[16] To intrude into the home was violation of a man's natural "right of habitation."[17] Burglary, traditionally defined as entry into the dwelling of another at night with the intent to commit a felony therein, was a capital crime.[18] A person in his home could with impunity use

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[12] On the common law duty to retreat, see R v. Bull, (1839) 173 Eng Rep. 723 (K.B.); R v. Smith, (1837) 173 Eng. Rep. 441 (K.B.).

[13] Richard M. Brown, No Duty to Retreat: Violence and Values in American History and Society 4 (1991) (describing English common law).

[14] Matthew Hale, History of the Pleas of the Crown 480 (Thomas Dogherty, ed., T. Payne 1800) (1678) .

[15] 4 William Blackstone, Commentaries *184–85.

[16] *Id.* at *223.

[17] Id., *supra* note 15, at *223–24.

[18] *Id.* at *227.

deadly force and kill the burglar.[19] This was as justifiable an act as executing a man on the king's command.

From the common law captured by Blackstone's formulation emerged the rule that in his home, a person could justifiably use deadly force against an intruder. The common law originally provided that a person could kill an intruder to the home to prevent his unlawful entry.[20] In parallel, the "castle doctrine," as a self-defense rule, provided that, in his home, a man had no duty to retreat from an intruder's violence before using deadly force in self-defense.[21]

Blackstone took pains to specify that the situation of a person in his home was unlike that of a person assaulted in a public place. He noted John Locke's proposal "that all manner of force without right upon a man's person, puts him in a state of war with the aggressor; and, of consequence, that, being in such a state of war, he may lawfully kill him."[22] But according to Blackstone, Locke's doctrine was not suitable to the law of England, which, "like that of every other well-regulated community, is too tender of the public peace, too careful of the lives of the subjects, to adopt so contentious a system."[23] Just as the common law distinguished violence among individuals from violence among nations, the latter of which might engage in violence without retreating, the common law rejected the view that individual aggression was tantamount to a "state of war."[24]

But in the home, the tenderness for peace of which Blackstone spoke was overridden by "tender . . . regard to the immunity of a man's house."[25]

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[19] *See* Semayne's Case, (1604) 77 Eng. Rep. 194, 195 (K.B.) ("[I]f thieves come to a man's house to rob him, or murder, and the owner or his servants kill any of the thieves in defence of himself and his house, it is not felony, and he shall lose nothing.").

[20] This doctrine is also called "defense of habitation," "defense of dwelling," or "defense of premises." *See, e.g.*, 1 B.E. WITKIN ET AL., CALIFORNIA CRIMINAL LAW, DEFENSES, § 78 at 121 (3d ed. Supp. 2007) (defense of habitation); 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW, § 10.6(b) at 167–69 (2d ed. 2003) (defense of dwelling and defense of premises). This broad rule has not been universal. Some states have narrowed it to cases where the home resident reasonably believes that the intruder intends to commit injury or a felony, and deadly force is necessary to repel the intrusion; others have narrowed it still further to cases where the home resident reasonably believes that the intruder intends to commit serious injury or a forcible felony and deadly force is necessary to prevent the intrusion. *See* DRESSLER, *supra* note 3 § 20.03[B], at 283–85 (citing cases and statutes).

[21] For a discussion of the distinct rationales of the doctrines of defense of dwelling and self-defense in the home, both arising out of the traditional notion of the castle, see Stuart P. Green, *Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles*, 1999 U. ILL. L. REV. 1; *see also* Catherine L. Carpenter, *Of the Enemy Within, the Castle Doctrine, and Self-Defense*, 86 MARQ. L. REV. 653 (2003); Michael, *supra* note 7, at 205–08. *Compare* DRESSLER, *supra* note 3 § 20.03, at 282–87, *with id.* § 18.02[C][3], at 245–46 (describing rules regarding the use of deadly force in the home in "Defense of Habitation" and the "castle exception" to the retreat rule in "Deadly Force: Clarification").

[22] BLACKSTONE, *supra* note 15, at *181 (quoting LOCKE, *infra* note 46).

[23] BLACKSTONE, *supra* note 15, at *181–82.

[24] *Id.* at *181 (quoting LOCKE, *infra* note 46).

[25] BLACKSTONE, *supra* note 15, at *223.

The law recognized the right to use deadly force to repel the home intruder without obligation to retreat. Within his home, a person had the right to defend his territorial borders as if at war. A crossing of this boundary triggered permission for the attacked individual to use force in the way a state normally does to defend its borders. Intrusion into the home thus placed the intruder beyond the protection of the law and suspended the state monopoly on violence.

B. The Right of the True Man

The remarkable change in the law of self-defense in late nineteenth-century America was the abandonment by the majority of states of the English duty to retreat in public places.[26] Under the new American rule, a person could stand his ground to kill in self-defense, not only in his home, but anywhere he lawfully had the right to be.[27] Scholars and courts have offered various explanations for the demise of the duty to retreat in so many states. According to one theory, the transformation represented judges' recognition of "the American mind" as unsuited to the English tradition of retreating from violence.[28] Others have emphasized notions of honor that pertained in the distinctive frontier of the American South and West.[29] One writer suggests that the spread of firearms may have contributed to judicial reasoning for abandoning the duty to retreat.[30]

In America, the ideal of the "true man" standing his ground prevailed over the cowardliness of fleeing from attack.[31] As the much-quoted 1876 case of *Erwin v. State* put it, "a true man, who is without fault, is not obliged

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[26] *See* BROWN, *supra* note 13, at 5; Garrett Epps, *Any Which Way But Loose, Interpretive Strategies and Attitudes Toward Violence in the Evolution of the Anglo-American "Retreat Rule,"* 55 LAW & CONTEMP. PROBS. 303, 311–13 (1992).

[27] *See* Beard v. United States, 158 U.S. 550, 561–62 (1895) (quoting Runyan v. State, 57 Ind. 80, 83 (1877)) (confirming the right of a person to "repel force by force" if he is attacked "in a place where he has a right to be"); Cooper v. United States, 512 A.2d 1002, 1005 (D.C. 1986) (noting that in jurisdictions following the "American rule . . . [,] one can stand one's ground regardless of where one is assaulted").

[28] *See* BROWN, *supra* note 13, at 17 (citing Runyan, 57 Ind. at 83 ("[T]he tendency of the American mind seems to be very strongly against . . . requir[ing] a person to flee when assailed")). Another commentator casts this nineteenth-century transformation as a shift away from the "chance-medley"—the spontaneous mutual quarrel that implied the contribution of some fault on both sides, and triggered a duty to retreat—toward "a new, highly personalized view of fault, in which either victim or aggressor was implicitly held to be responsible for all the violence." *See* Epps, *supra* note 26, at 314.

[29] *See* Joseph H. Beale, Jr., *Retreat From a Murderous Assault*, 16 HARV. L. REV. 567, 577 (1903); *see also* BROWN, *supra* note 13, at 7.

[30] *See* David B. Kopel, *The Self-Defense Cases: How the United States Supreme Court Confronted a Hanging Judge in the Nineteenth Century and Taught Some Lessons for Jurisprudence in the Twenty-First*, 27 AM. J. CRIM. L. 293, 307 (2000) (quoting the Minnesota Supreme Court[']s statement that "[it] would be rank folly to [ ] require" an attempt to escape "when experienced men, armed with repeating rifles, face each other in an open space, removed from shelter, with intent to kill or do great bodily harm.").

[31] Erwin v. State, 29 Ohio St. 186, 199 (1876); *see also* BROWN, *supra* note 13, at 5; WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 5.7(f) (2d ed. 1986) (not-

to fly from an assailant, who, by violence or surprise, maliciously seeks to take his life or do him enormous bodily harm."[32]

What, though, was a "true man"? There was of course the connotation of bravery in the face of another man's physical challenge, or even the manly confrontation of other forms of conflict.[33] But beyond that kind of manliness, the rhetoric of the "true man" drew on several different social meanings. The most literal was the idea of a man who was "true" in the sense of honest, and who made decisions based on what he believed was true.[34] This notion easily comported with the view that a "true man" should not have to flee from an attack, because he had presumably done nothing wrong to provoke or deserve the attack.

The "true man" had a certain relationship and attitude toward his home and family.[35] A "true man" did whatever was necessary to provide economically for his wife and children, who were dependent on him.[36] He was the source of strong moral guidance for his vulnerable or needy wife or children.[37] A newspaper article of the time wrote of "the sentiment that every man should support some woman—his heart's mate, whom he loves and for whom he strives. The chivalry which makes the strong sex the natural pro-

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ing that the "no retreat" doctrine reflects "a policy against making one act a cowardly and humiliating role").

[32] Erwin, 28 Ohio St. at 199–200.

[33] *Cf., e.g.*, Wilson v. Jordan, 33 S.E. 139, 147 (N.C. 1899) (describing judges, reluctant to decide a novel legal issue, "driven to it, at last faced the issue manfully as true men").

[34] *See, e.g.*, People v. News-Times Pub. Co., 84 P. 912, 957 (Colo. 1906) (Steele, J., dissenting) ("[S]hould I do what any true man ought to do, firmly believing that he spoke the truth—say that he had spoken the truth and offer to establish the verity of the articles?"); Mangold v. Bacon, 130 S.W. 23, 34 (Mo. 1910) (Lamm, J., dissenting) ("If you meet a thief, you may suspect him . . . to be no true man; and, for such kind of men, the less you meddle or make with them, why, the more is for your honesty."); *see also*, *e.g.*, Springfield Republican, *A Singular Case*, N.Y. Daily Times, June 16, 1852, at 4 ("Dr. DeWolf deserves much credit, not for being honest, for a true man could hardly be otherwise, but . . . for delivering to justice, an offender against the laws."). Many cases of the era also refer to the "good and true men" of the jury. *See, e.g.*, State v. Williams, 14 S.E. 819, 820 (S.C. 1892) ("The requirements of the law are fully met when good and true men are called to serve upon the juries of our country . . . .").

[35] *See, e.g.*, *Many at Funeral of Mr. Guggenheimer*, N.Y. Times, Sept. 16, 1907, at 9 ("He was a true man, loyal to friends, generous to his foes, and devoted to his family."); *Webster's Biography*, N.Y. Daily Times, Nov. 3, 1852, at 4 ("[N]othing has ever so drawn the heart towards the strong, solitary man, as these expressions of home affection . . . . There is the heart of a true man in it.").

[36] *See, e.g.*, Hunter v. State, 134 P. 1134, 1138 (Okla. Crim. App. 1913) ("A true man, if he cannot get the kind of work which he wants, will do any kind of work which he can get which will enable him to support himself and those dependent upon him, and if he will not do this he is not entitled to public sympathy and respect.").

[37] *See, e.g.*, Kuster v. Kuster, 74 N.Y.S. 853, 854 (Sup. Ct. 1902) ("[T]he husband humored the odd whims and fancies of his wife, and did all that a true man in such an unfortunate situation could do."); Glass v. Bennett, 14 S.W. 1085, 1086 (Tenn. 1891) (stating that a father who gave his daughter "counsel and honest advice for her own good . . . and sheltered her in his own house . . . did just what any honest, good father, with any of the spirit of a true man, will always do . . . .").

tector of the weak runs in every true man's blood."[38] To be a "true man" was to be a man who supported and protected a woman. He treated her sexual virtue with respect, even reverence.[39] And similarly, a "true man" was protective of children. Mirroring the "particular and tender . . . regard to the immunity of a man's house" found in the common law,[40] "every true man" was supposed to evince a "tender and loving regard . . . for children, and [an] impulse to protect them from harm . . . ."[41]

The regard was not only for family but also for country,[42] reflecting the age-old Western idea of the household as the fundamental building block of the state.[43] "True men" were patriots and protectors of the nation who would fight if necessary, and in particular, fight to safeguard the legal rights fundamental to freedom.[44] They had a sense of civic responsibility tied to the duty to ensure the rule of law and the leadership of the nation.[45]

The "true man" rhetoric thus importantly valorized the man's role as protector of his home and family. Reliance on the concept of the true man, then, enabled judges to leverage this appealing idea of a man defending his home and family into a more general authorization of self-defense in public places, even where the home and family were nowhere to be seen. The man defending his family against attack at home was the implicit model for the "true man" of self-defense law who in fact was permitted to defend himself without retreating from *any* place where he had a right to be.

Judicial opinions adopting the "true man" approach deployed a characteristically rights-focused language reminiscent of the view that an attack "without right" puts a person in a "state of war" and authorizes him to use deadly force.[46] The new account of self-defense translated the idea of territorial boundary-crossing into a violation of a person's rights.

The paradigmatic territory in which a person initially had rights, of course, was the home. The 1877 case of *Runyan v. State*[47] illustrated the

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[38] Theodore Tilton, *Practical Female Education*, N.Y. TIMES, Aug. 6, 1871, at 1.

[39] *See, e.g.*, Brown v. State, 132 P. 359, 372 (Okla. Crim. App. 1913) ("A pure woman is the masterpiece and climax of God's creation and as such is regarded by all true men with a feeling of respect which borders upon reverence . . . .").

[40] BLACKSTONE, *supra* note 15, at *223.

[41] Erickson v. Great N. Ry. Co., 84 N.W. 462, 463 (Minn. 1900).

[42] *Topics of the Times: Nature and Its First Law*, N.Y. TIMES, July 22, 1905, at 6 ("We all . . . expect a true man to sacrifice his life, if necessary, for country or for family . . . .").

[43] *See* ARISTOTLE, THE POLITICS 9–10 (Ernest Barker trans., R.F. Stalley rev. trans., Oxford Univ. Press 1995) (c. 335–322 B.C.E.).

[44] *See, e.g.*, Pope v. Phifer, 50 Tenn. 682, 704 (1870) (discussing the legal "guaranties for life, liberty and property, won from power in all ages past by brave and true men—patriots and lovers of freedom . . . .").

[45] *See, e.g.*, State v. Staten, 46 Tenn. 233, 271 (1869) ("Every true man felt the necessity of restoring the supremacy of the law, and this could only be done by putting the machinery of the State government in operation, filling the various offices that had become vacant, and opening the courts of the country.").

[46] *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 296–98 (Peter Lasslet ed., Cambridge Univ. Press 1967) (1690).

[47] Runayn v. State, 57 Ind. 80 (1877).

leveraging of the right of a man to protect his home and family into a territorially unmoored right to defend himself in public without a duty to retreat. The court characterized the law thus: "[W]hen a person, being without fault and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force, and if, in the reasonable exercise of his right of self-defense, his assailant is killed, he is justified."[48] The Indiana Supreme Court described the "tendency of the American mind" to be "very strongly against . . . any rule which requires a person to flee when assailed . . . ."[49] Similarly, in the 1876 case of *Long v. State*,[50] the Mississippi Supreme Court stated:

> Flight is a mode of escaping danger to which a party is not bound to resort, so long as he is in a place where he has a right to be, and is neither engaged in an unlawful enterprise, nor the provoker of, nor the aggressor in, the combat. In such case he may stand his ground and resist force by force . . . .[51]

In neither of these cases was the "place where he has a right to be" actually a home nor a place where he had a property right. In *Runyan*, the fight broke out on "the sidewalk, near the voting place,"[52] and in *Long*, outside a court house.[53] Both fights were in public places. Yet each defendant was "in a place where he had a right to be" and thus was not required to retreat when attacked. The right to be in a place was not confined to the home. Rather, the right accompanied the individual wherever he went. The rule of no duty to retreat was based on a right to be in any legitimate place. It was the intrusion on that right that relieved the person of the duty to retreat.

C. The Home

Not all states abandoned the duty to retreat for the "true man" doctrine. But states that retained the duty to retreat preserved the castle doctrine, which allowed deadly force without requiring retreat from a home intruder's attack. Alabama, for example, acknowledged in 1847 that it had retained the common law duty to retreat,[54] but like other duty-to-retreat states, it treated the home differently: "Of course, where one is attacked in his own dwelling-house, he is never required to retreat. His 'house is his castle,' and the law permits him to protect its sanctity from every unlawful invasion."[55]

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[48] *Id.* at 84.
[49] *Id.*
[50] Long v. State, 52 Miss. 23 (1876).
[51] *Id.* at 35.
[52] *Runyan*, 57 Ind. at 81.
[53] *Long*, 52 Miss. at 31.
[54] Pierson v. State, 12 Ala. 149 (1847).
[55] Storey v. State, 71 Ala. 329, 337 (1882) (internal citations omitted). *See also, e.g.*, Jones v. State, 76 Ala. 8, 16 (1884) ("It is an admitted doctrine of our criminal jurispru-

If the American "true man" rule was based on the idea of a man being in a place where he has a right to be, the home was of course the quintessential place where a man had a right to be. If a person does not have a right to be at home, there is perhaps no place where he has a right to be.[56] The castle then provided a model and analog for the new "true man" rule, a rule that extended into public space the self-defense right that had its origin in the home.

The 1895 United States Supreme Court case of *Beard v. United States* presented the question whether there was a duty to retreat when attacked on one's premises outside the home.[57] Justice Harlan, writing for the Court, held that there was no duty to retreat: The accused was "where he had a right to be, on his own premises, constituting a part of his residence and home . . . ."[58] But it was ambiguous whether the holding was limited to the particular place where the defendant was attacked, property he owned near his house.[59] It was unclear whether *Beard* followed the castle doctrine (no duty to retreat in the home) or the American "true man" doctrine (no duty to retreat wherever a person has a right to be). This ambiguity was about the role that the home was playing in the self-defense right. Was being at home essential to the conclusion that he was in a place where he had a right to be, or was the home merely an indication of being in such a place?

Subsequent Supreme Court cases took *Beard* as a broad holding of no duty to retreat generally, in accordance with the "true man" rule, and not a narrower holding about premises deemed part of the home.[60] But within *Beard*'s ambiguity we can discern the leveraging work done by the home. Referring specifically to the "premises, constituting a part of his residence and home" and gesturing toward a general principle of no duty to retreat in any place where a person has a right to be, *Beard* deployed the home as the paradigm of a place where he has a right to be.[61]

The Court was able to expand out from the home—the exemplar of the right to be in a place—to other spaces such as the premises near the home and to general public space. The home, traditionally the only place where there was no duty to retreat, became the means to perform the expansion to

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dence, that when a person is attacked in his own house, he is not required to retreat further . . . . [T]he law regards a man's house as his castle, or, as was anciently said, his '*tutissimum refugium*,' and having retired thus far, he is not compelled to yield further to his assailing antagonist.").

[56] *See* Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. Rev. 295, 300 (1991) ("[E]ach of us has at least one place to be in a country composed of private places, whereas the homeless person has none.").

[57] Beard v. United States, 158 U.S. 550 (1895).

[58] *Id.* at 560.

[59] *See* Beale, *supra* note 29, at 579–80.

[60] *See, e.g.*, Brown v. United States, 256 U.S. 335, 343 (1921); Alberty v. United States, 162 U.S. 499, 507–08 (1896); Allen v. United States, 164 U.S. 492, 498 (1896); Rowe v. United States, 164 U.S. 546, 557 (1896); *see also* Epps, *supra* note 26, at 318–22.

[61] *Beard*, 158 U.S. at 560.

the "true man" rule of no duty to retreat. The true man's role, to protect the home and family, functioned as a model for the broader self-defense right of the true man.

D. Cohabitants

The problem of violence between people inhabiting the same private space forced courts to confront and adapt the model of a man defending his home and family from an outsider's attack.

In the 1884 case of *Jones v. State*, the Alabama Supreme Court applied the castle doctrine to a fight between two men who had "equal rights of possession."[62] Rehearsing the principle that "the law regards a man's house as his castle,"[63] the court saw no basis for not applying this principle to a person attacked by a cohabitant:

> Why . . . should one retreat from his own house, when assailed by a partner or co-tenant, any more than when assailed by a stranger who is lawfully upon the premises? Whither shall he flee, and how far, and when may he be permitted to return? He has a lawful *right to be and remain there*, and the legal nature and value of this right is not abrogated by its enjoyment in connection with another. The law only exacts of each that he shall enjoy his property and possession so as not to injure the other. . . .[64]

Thus applying the castle doctrine, the court emphasized the idea of the right to be in the home, even when both the assailant and the defender were "equally entitled to possession of the house or premises where the attack [was] made."[65]

Violence among occupants of a home surely did not fit the ideal of a man defending his home and family from an intruder. But the *Jones* court was able to apply the castle doctrine to cohabitants by relying on the idea of each cohabitant's right to be there. This was consistent with prior cases like *Runyan*, which relied on the idea of a defender's right to be in a place, even when he was in a public place where other people including the assailant also had a right to be. That both parties had no particularized right to be in a place did not diminish the defendant's right to be there. Thus the right of the true man could support both a rule of no duty to retreat from a cohabitant in the home and a rule of no duty to retreat in public space.

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[62] Jones v. State, 76 Ala. 8, 16 (1884). The facts of *Jones* involved a place of business; the court held that "a man's place of business must be regarded, *pro hac vice*, his dwelling; that he has the same right to defend it against intrusion, that he has to defend his dwelling; and that he is no more under the necessity of retreating from the one than the other . . . ." *Id.*

[63] *Id.*

[64] *Id.* (emphasis added).

[65] *Id.*

In the 1914 New York case of *People v. Tomlins*,[66] then-Judge Cardozo engaged in a similar move, first invoking the castle doctrine:

> It is not now, and never has been the law that a man assailed in his own dwelling, is bound to retreat. If assailed there, he may stand his ground, and resist the attack. He is under no duty to take to the fields and the highways, a fugitive from his own home.[67]

Judge Cardozo explained the castle doctrine as embodying the idea of the home as the ultimate sanctuary:

> In case a man is assailed in his own house, he 'need not fly as far as he can, as in other cases of *se defendendo*, for he hath the protection of his house to excuse him from flying, for that would be to give up the possession of his house to his adversary by his flight.' Flight is for sanctuary and shelter, and shelter, if not sanctuary, is in the home.[68]

Judge Cardozo then held that "[t]he rule is the same whether the attack proceeds from some other occupant or from an intruder."[69] Since sharing a home did not render the home any less a sanctuary for the occupant, there was no reason to treat cohabitant attackers differently from intruders. The idea that fleeing would mean giving up possession of the home to the other person underscored the importance of standing one's ground.

Jones and *Tomlins* applied the castle doctrine to the cohabitant, then, by retaining and accentuating the logic of the man's relation to his home and the right of the true man. Although the attack originating within the home and among the home's residents had obvious potential to disrupt the ideal of an intruder's attack across the home boundary, courts could comfortably assimilate the cohabitant scenario into the true man's right to repel an attack wherever he had a right to be—and most ideally at home.

II. The Subordinated Woman

Notwithstanding this treatment of violence within the space of the home, some castle doctrine jurisdictions did make a distinction between an attack by a home intruder and an attack in the home by a cohabitant.[70] In

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[66] People v. Tomlins, 213 N.Y. 240 (1914).

[67] *Id.* at 243.

[68] *Id.* (quoting Hale, *supra* note 14, at 486).

[69] *Tomlins*, 213 N.Y. at 243–44.

[70] *See, e.g.*, State v. Shaw, 441 A.2d 561, 566 (Conn. 1981); Cooper v. United States, 512 A.2d 1002, 1006 (D.C. 1986); State v. Bobbitt, 415 So. 2d 724, 726 (Fla. 1982), *rev'd*, Weiand v. State, 732 So. 2d 1044, 1051–52 (Fla. 1999); Oney v. Commonwealth, 9 S.W.2d 723, 725 (Ky. 1928); State v. Leidholm, 334 N.W.2d 811, 820–21 (N.D. 1983); State v. Grierson 69 A.2d 851, 854–55 (N.H. 1950); State v. Gartland, 694 A.2d 564, 569–70 (N.J. 1997); State v. Pontery, 117 A.2d 473, 475 (N.J. 1955); Commonwealth v. Walker, 288 A.2d 741, 743 (Pa. 1972); Commonwealth v. Johnson, 62 A. 1064, 1064–65

these states, the castle doctrine did not apply if the attacker was a cohabitant. Persons acting in self-defense in the home thus had a duty to retreat.

A distinctive discernible concern was the castle doctrine's implications for family strife. An illustrative example is the 1981 case of *State v. Shaw*,[71] in which the Connecticut Supreme Court interpreted the castle doctrine provision of the state's self-defense statute as providing a cohabitant exception to the castle doctrine.[72] The court reasoned: "In the great majority of homicides the killer and the victim are relatives or close acquaintances . . . . We cannot conclude that the Connecticut legislature intended to sanction the reenactment of the climactic scene from 'High Noon' in the familial kitchens of this state."[73]

As it happens, *Shaw*'s facts did not actually involve spouses or family members, but rather male roommates. The defendant rented a bedroom in a house owned and occupied by the man he was accused of assaulting.[74] Nevertheless, the court in *Shaw* actively drew attention to the castle doctrine's implications for the family. The court's concern was concurrent with the increasing public recognition that DV was a serious and widespread crime. By the 1980s, the feminist movement had powerfully made the argument that violence against women in the home.[75] Law enforcement was beginning to change its attitude toward DV and to increasingly treat DV as crime rather than a private matter.[76] The court's unwillingness to construe the state statute codifying the castle doctrine as applicable to cohabitants was, by the court's own account, motivated by the need to avoid sanctioning family violence.[77] But the court reacted to the problem of violence to which it adverted by refusing to permit the attacked person to defend himself without retreating. The court's ruling, explicitly motivated by disapproval of family violence,

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(Pa. 1906); State v. Ordway, 619 A.2d 819, 823–24 (R.I. 1992) (holding that the castle doctrine does not apply to an invitee); State v. Quarles, 504 A.2d 473, 476 (R.I. 1986); *see also* Linda A. Sharp, Annotation, *Homicide: Duty to Retreat Where Assailant and Assailed Share the Same Living Quarters*, 67 A.L.R. 5th 637 (1999) (indicating that a duty to retreat from the home when attacked by a cohabitant is the minority position among states that have considered the issue).

[71] *Shaw*, 441 A.2d 561.

[72] The Connecticut statute provided, in relevant part, that "a person is not justified in using deadly physical force. . .if he knows that he can avoid the necessity of using such force with complete safety [ ] by retreating, except that the actor shall not be required to retreat if he is in his dwelling . . . ." *See id.* at 563–64 (quoting CONN. GEN. STAT. ANN. § 53a-19).

[73] *Shaw*, 441 A.2d at 566 (citation omitted).

[74] *Id.* at 562.

[75] *See generally* R. EMERSON DOBASH & RUSSELL DOBASH, VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY (1979); VIOLENCE IN THE FAMILY (Suzanne K. Steinmetz & Murray Arnold Straus eds., 1974); LENORE E. WALKER, THE BATTERED WOMAN (1979).

[76] *See* Stephen J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2158–70 (1994); Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46, 62 (1992).

[77] *See Shaw*, 441 A.2d at 566.

seemed a willful denial of what the court itself had stated: That most homicides take place in the familial setting.

The court's reference to *High Noon*, the archetypal Western, called up violence between men—the "true man" ideal—in the frontier West.[78] The image of "familial kitchens" referred, by contrast, to female domesticity associated with the private sphere of the home. Putting "'High Noon' in the familial kitchens of this state" juxtaposed one picture of violence with the other. This comparison of the open public space of the frontier with the interior domestic space of the kitchen seemed to highlight a sharp normative contrast between two kinds of violence. The court acknowledged that "the great majority of homicides"[79] occur in the home, but suggested there was something inappropriate or unsettling about behaving like a true man in that domestic space.

The rhetoric of the "familial kitchens of this state" had a particularly gendered nuance.[80] The kitchen was of course the traditionally feminine domain, the part of the house in which women exert control. If the castle, like the frontier, represented male territoriality, the kitchen evoked a female territoriality. Thus, anxiety about extending the logic of the castle doctrine, in which a man has permission to exercise deadly force, to familial kitchens, was coded as anxiety about women's violence—specifically wives killing husbands.[81]

The subversiveness of the very idea of wives killing husbands was age-old. On the topic of violence between husband and wife at common law, Blackstone had observed:

> If the baron kills his feme it is the same as if he had killed a stranger, or any other person; but if the feme kills her baron, it is regarded by the laws as a much more atrocious crime, as she not only breaks through the restraints of humanity and conjugal affection, but throws off all subjection to the authority of her husband. And therefore, the law denominates her crime a species of treason, and condemns her to the same punishment as if she had killed the king . . . to be drawn and burnt alive.[82]

The castle was a microcosm of the realm, and the man of the castle was like the king. Thus, the idea of a wife killing her husband represented a threat

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[78] HIGH NOON (Republic Pictures 1952).

[79] *Shaw*, 441 A.2d at 566.

[80] *Cf.* State v. Bobbitt, 415 So.2d 724, 726 (Fla. 1982) ("[W]e see no reason why a mother should not retreat from her son, even in her own kitchen.") (citation omitted).

[81] *Cf.* BATTERED WOMEN: A PSYCHOSOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE 139 (Maria Roy ed., 1977) (noting that many domestic violence cases result in wives killing their husbands); *cf. generally* David L. Faigman, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619 (1986) (questioning the validity of the battered women syndrome and its use as a self-defense claim).

[82] WILLIAM BLACKSTONE, COMMENTARIES *445 n.38.

not only to a human life, but to the notion of being a subject who is governed—or put another way, to being ruled by legal authority.

If the killing of one's wife was treated like the killing of a stranger, while the killing of one's husband was treated as a much worse crime, then we could infer that the idea of a woman killing her husband might give common law judges pause in applying the castle doctrine in family situations. *Shaw* gestured at the possibility that the castle doctrine could become a legal doctrine about and for family violence. *Shaw* prefigured a shift away from the true man ideal and toward a model of crime with which to understand the unsettling phenomenon of wives killing husbands at home.

Feminists have argued that the law of self-defense has been a particularly significant site of gender bias.[83] According to one feminist scholar writing in the late 1980s, the cohabitant exceptions to the castle doctrine "have been applied so exclusively to [battered women] that the courts over the years appear to have developed these new rules specifically to prevent women who kill their husbands from 'getting away with murder.'"[84] Whether or not such a motivation can be imputed to the courts, applying the castle doctrine to cohabitants and not imposing a duty to retreat permits battered women to stand their ground against their batterers.[85] As courts have noted, imposing a duty to retreat from cohabitants therefore causes problems for battered women who stand their ground and kill their batterers.[86]

In the late 1990s, this recognition of the gendered impact of the castle doctrine began to inform change in self-defense law. Several castle doctrine states that previously imposed on cohabitants a duty to retreat have, in the last decade, through judicial interpretation, moved away from a duty to retreat for cohabitants to a rule of no duty to retreat for cohabitants. These state courts explicitly grounded their doctrinal shifts on a sympathetic understanding of the dynamics of DV and its victims.

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[83] For a discussion of legal reform feminists have sought for battered women who kill, see ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 112–47 (2000).

[84] *See* GILLESPIE, *infra* note 87, at 82; *see also* Carpenter, *supra* note 21 (arguing that courts applying the cohabitant exception to the castle doctrine are improperly motivated by principles of property rights rather than personal safety, and that the effect is to rob abused women of the right of self-defense); Koons, *supra* note 7(arguing that the retreat and castle doctrines operate to subordinate women).

[85] *See, e.g.*, DRESSLER, *supra* note 3, § 18.02[C][3], at 246 ("[M]any in-the-home defense cases involve a female who needs to defend herself from an abusive domestic partner.").

[86] *See, e.g.*, Weiand v. State, 732 So. 2d 1044, 1052 (Fla. 1999) ("[I]mposing a duty to retreat from the home may adversely impact victims of domestic violence."); State v. Glowacki, 630 N.W.2d 392, 401 (Minn. 2001) ("[A] no duty to retreat rule recognizes the realities facing those persons, mostly women, living in situations of domestic violence."); State v. Gartland, 694 A.2d at 564, 570 (N.J. 1997) ("Given that most men are assaulted and killed outside their homes by strangers, while most women are assaulted and killed within their homes by male intimates, this doctrine also disadvantaged women.") (citing Marina Angel, *Criminal Law and Women: Giving the Abused Woman Who Kills a Jury of Her Peers Who Appreciate Trifles*, 33 AM. CRIM. L. REV. 229, 320 (1996)).

State v. Thomas, a 1997 Ohio Supreme Court case in which a woman killed her violent live-in boyfriend during a confrontation, and claimed self-defense based on Battered Woman Syndrome, held that the castle doctrine applied to cohabitants of a home.[87] The court in this case gestured in the direction of the familiar traditional justifications for such an application of the doctrine. It articulated the rationale that "a person in her own home has already retreated 'to the wall,' as there is no place to which she can further flee in safety," and the view—familiar from old cases like *Jones* and *Tomlins*—that there is no distinction to be made between an intruder attacker and a cohabitant attacker.[88] But the court was clear that the traditional view was not doing all the work of justification for the rule it announced.

The court indicated its understanding of DV and concern for battered women by citing a string of academic articles on battered women and self-defense.[89] It stated that

> in the case of domestic violence, . . . the attacks are often repeated over time, and escape from the home is rarely possible without the threat of great personal violence or death. The victims of such attacks have already 'retreated to the wall' many times over and therefore should not be required as victims of domestic violence to attempt to flee to safety . . . .[90]

In this context, the language of "retreat to the wall" took on a new meaning.[91] Retreat was in fact what the battered woman had been forced to do "many times over" in the course of being repeatedly abused. Retreat was indicative of her lack of choice. Hence, to speak of a duty to retreat in this context was inapt. Her ability to observe such a duty would require the

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[87] State v. Thomas, 673 N.E.2d 1339 (Ohio 1997). On Battered Woman Syndrome, *see generally* CHARLES EWING, BATTERED WOMEN WHO KILL: PSYCHOLOGICAL SELF-DEFENSE AS LEGAL JUSTIFICATION (1987); CYNTHIA K. GILLESPIE, JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE, AND THE LAW (1989); Elaine Chiu, *Confronting the Agency in Battered Mothers*, 74 S. CAL. L. REV. 1223 (2001); Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1 (1994); David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67 (1997); Kit Kinports, *Defending Battered Women's Self-Defense Claims*, 67 OR. L. REV. 393 (1988); Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379 (1991); Nourse, *infra* note 118; Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C. L. REV. 371 (1993); Schulhofer, *supra* note 76.

[88] *Thomas*, 673 N.E.2d at 1343.

[89] *See id.* (citing Angel, *supra* note 86; Alison M. Madden, *Clemency for Battered Women Who Kill Their Abusers: Finding a Just Forum*, 4 HASTINGS WOMEN'S L.J. 1 (1993); Paige Bigelow, Comment, *Guilty of Survival*: *State v. Strieby and Battered Women Who Kill in Utah*, 92 UTAH L. REV. 979 (1992); Maguigan, *supra* note 87; Mahoney, *infra* note 129; Creach, Note, *Partially Determined Imperfect Self-Defense: The Battered Wife Kills and Tells Why*, 34 STAN. L. REV. 615 (1982)).

[90] *Thomas*, 673 N.E.2d at 1343; *see also id.* at 1346–48 (Stratton, J., concurring).

[91] Under the English common law individuals could not defend themselves with violence until they had attempted to retreat as far as possible: to the wall at their backs. *See* BROWN, *supra* note 13 at 4.

exercise of choice, which the court suggested the battered woman could not do because of the abuse. Indeed, to require her to attempt escape from the home was to make her more vulnerable to violence and death.

The court shifted the focus away from her self-defense right and toward her incapacity to retreat. The traditional castle doctrine had been based on a view that the assailant's intrusion on the defender's autonomy triggered permission for the defender to use force to repel the violence.[92] Here, by contrast, the suspension of the duty to retreat was based on a revised view of the victim whose autonomy was so severely limited that retreat was not a plausible choice. She could not have a duty to retreat because escape from the home was "rarely possible."

The contemporaneous 1997 case *State v. Gartland*, involving a wife who shot her husband in a confrontation in which he lunged at her with his fists, addressed the application of a statutory duty to retreat from the home.[93] The New Jersey statute clearly indicated that the castle doctrine did not apply to cohabitants.[94] The New Jersey Supreme Court thus found that the statute imposed a duty to retreat from attack by a spouse in the home. But it criticized the statute and "commend[ed] to the Legislature consideration of the application of the retreat doctrine in the case of a spouse battered in her own home."[95] The court took the opportunity to explain that the castle doctrine "affect[ed] battered women as criminal defendants."[96] Citing the traditional language of the "true man" and of being "in a place that he has a right to be,"[97] the court noted that the "male pronouns" in the statute "reflect a history of self-defense that is derived from a male model."[98]

The court then spoke through quotations from feminist articles about battered women, explaining that the cohabitant exception was unfair to women abused in their homes: "During repeated instances of past abuse, she has 'retreated,' only to be caught, dragged back inside, and severely beaten again."[99] Fleeing was futile for battered women, and only led to their further victimization. The court presented a picture of "men who were holding [women] with one hand and beating them with the other or who had them pinned down on the floor or trapped in a corner or were menacing them with a knife or with a loaded gun."[100] Perhaps unconsciously echoing the often quoted nineteenth-century rhetoric of *Jones v. State*, "Whither shall he flee,

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[92] *See* GEORGE FLETCHER, RETHINKING CRIMINAL LAW 860–61 (1978).

[93] State v. Gartland, 694 A.2d 564 (N.J. 1997).

[94] *Id.* at 569–70. The statute provided, in relevant part, that "[t]he actor is not obliged to retreat from the dwelling, unless . . . assailed in [the actor's own] dwelling by another person whose dwelling the actor knows it to be . . . ." N.J. STAT. ANN. § 2C: 3-4b(2)(b)(i) (1999).

[95] Gartland, 694 A.2d at 571.

[96] *Id.* at 570.

[97] *Id.* at 570 n.1.

[98] *Id.* at 570.

[99] *Id.* (quoting Maryanne Kampmann, *The Legal Victimization of Battered Women*, 15 WOMEN'S RTS. L. REP. 101, 112–13 (1993)).

[100] *Gartland*, 694 A.2d at 570–71 (quoting Kampmann, *supra* note 99, at 112–13).

and how far, and when may he be permitted to return?",[101] the *Gartland* court gave voice to "[a]dvocates of women's rights [who] seek change,"[102] asking, "Where will she go if she has no money, no transportation, and if her children are left behind in the 'care' of an enraged man?"[103]

Recall that *Jones*'s reasoning for allowing a man to stand his ground at home against a cohabitant was that "[h]e has a lawful right to be and remain there."[104] This reasoning placed the cohabitant attack fully within the ambit of the castle doctrine. *Gartland*'s feminist-influenced approach to the unfairness of the cohabitant exception, however, did not exploit this ability of the common law to encompass cohabitant situations within the castle doctrine, as exemplified by *Jones* and *Tomlins*. Instead, it characterized the "[t]raditional common law of self-defense" as "impos[ing] no duty to retreat, except for co-occupants of the same house."[105]

The court could have relied on common law cases and applied the "true man" idea to the battered woman, who should in principle be able stand her ground in her home whether the attacker was an intruder or an intimate, just as the true man was able to defend himself against a cohabitant in Alabama as early as 1884.[106] Instead, *Gartland* took a differently gendered route that turned on the special circumstances of battered women, adapted uncritically from the accounts of feminist scholars and advocates who emphasized battered women's impaired autonomy.[107] In asking the legislature to reconsider the statutory duty to retreat, the court specifically presented the issue as the application of the castle doctrine "in the case of a spouse battered in her own home."[108] It noted that at the time of the drafting of the statute, "the public was not fully aware of the epidemic of domestic violence."[109] A few years later, in 1999, New Jersey did revise its self-defense law specifically to provide that a DV victim had no duty to retreat.[110]

Gartland represented a key transition from the true man to the subordinated woman. The common law contained the legal tools to give the battered woman the right to stand her ground in her home like the true man, but *Gartland* represented instead a critique of the common law theory of crime

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[101] Jones v. State, 76 Ala. 8, 16 (1884).
[102] *Gartland*, 694 A.2d at 570.
[103] *Id.* (quoting Kampmann, *supra* note 99, at 112–13).
[104] *Jones*, 76 Ala. at 16.
[105] *Gartland*, 694 A.2d at 570 (quoting Angel, *supra* note 86, at 320).
[106] *Jones*, 76 Ala. at 16.
[107] *Cf.* Maguigan, *supra* note 87 (arguing that the dominant view of legal reformers, that traditional self-defense law is too narrowly male-identified to accommodate the claims of battered women and thus must be radically redefined, is based on uncritical acceptance of erroneous assumptions that battered women mostly kill in non-confrontational situations and that the law by definition ignores social context).
[108] *Gartland*, 694 A.2d at 571.
[109] *Id.*
[110] *See* S. 271, 208th Leg., Reg. Sess. (N.J. 1998), *revising* N.J.STAT.ANN. § 2C:3-4 (1987).

as intrusion on a true man's autonomy, and an adoption of a new theory of crime as patriarchal subordination.

This development was also pronounced in the 1999 Florida Supreme Court case of *Weiand v. State*, another case in which a woman shot and killed her husband during a violent argument in the home.[111] *Weiand* overturned a 1982 case holding that the castle doctrine did not apply to cohabitants and that the state had imposed a duty to retreat based on spouses' equal rights to be in the home and their equal inability to eject each other.[112] In an about-face, *Weiand* stated: "[W]e can no longer agree with [the] view that relies on concepts of property law and possessory rights to impose a duty to retreat from the residence."[113] The need to overturn this precedent came from the recognition that

> much has changed in the public policy of this State, based on increased knowledge about the plight of domestic violence victims. It is now widely recognized that domestic violence 'attacks are often repeated over time, and escape from the home is rarely possible without the threat of great personal violence or death.'[114]

The court quoted descriptions of the victimization and restricted autonomy of battered women, some of them the same texts on which *Gartland* had relied.[115] It cited statistics on the prevalence of DV and studies indicating that leaving a battering relationship can increase danger.[116]

Weiand specifically expressed concern about legitimizing, in the jury's mind, the "common myth that the victims of domestic violence are free to leave the battering relationship any time they wish to do so . . . ."[117] The court worried that a jury, prey to that myth, would ask why the battered woman did not leave the relationship and conflate that question with why she did not flee the particular attack that led to her killing her batterer.[118]

Ironically, however, the conflation of those two questions was integral to *Weiand*'s reasoning. Citing expert evidence that "battered women do not feel free to leave a battering relationship," the court said that to impose a

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[111] Weiand v. State, 732 So. 2d 1044, 1051 (Fla. 1999) (*overturning* State v. Bobbitt, 415 So. 2d 724, 726 (Fla. 1982) (holding that the castle doctrine does not apply where both husband and wife "had equal rights to be in the 'castle' and neither had the legal right to eject the other," and holding that there is no duty to retreat from a co-occupant in the home)).

[112] *Bobbitt*, 415 So. 2d at 726.

[113] *Weiand*, 732 So. 2d at 1051.

[114] *Id.* at 1052–53 (quoting State v. Thomas, 673 N.E.2d 1339, 1343 (Ohio 1997)).

[115] *Weiand*, 732 So. 2d at 1053 (quoting State v. Gartland, 694 A.2d 564, 570–71 (N.J. 1997) (quoting Kampmann, *supra* note 99, at 112–13)).

[116] *Weiand*, 732 So. 2d at 1053–54.

[117] *Id.* at 1054.

[118] *Id.*; *see also* V.F. Nourse, *Self-Defense and Subjectivity*, 68 U. CHI. L. REV. 1235, 1280 (2001) ("The feminist position has generally been hostile to retreat rules on the theory that they too easily dissolve into questions about why the woman did not leave the relationship rather than whether the knife was poised above her head.").

"duty to retreat from the home would undermine our reasons . . . for approving expert testimony on battered woman's syndrome" in self-defense cases.[119] A core idea of Battered Woman Syndrome is that battered women suffer from "learned helplessness" and as a consequence do not feel free to leave a battering relationship.[120] This view in turn can lead to the inference that they are not free to flee any particular attack. The incapacity to leave the relationship appears to encompass the incapacity to flee the attack. The court thus took the view that a battered woman cannot flee from a particular attack much in the same way that she cannot leave the relationship.[121]

Together, *Thomas*, *Gartland*, and *Weiand* represented a late-1990s transformation of self-defense.[122] If *Shaw* in 1981 presaged this development with its anxiety about "'High Noon' in the familial kitchens of" the state,[123] these cases confronted squarely the concern that "[i]n the great majority of homicides the killer and the victim are relatives or close acquaintances,"[124] and that "[t]here are dramatically more opportunities for deadly violence in the domestic setting than in the intrusion setting."[125] If violence was indeed such a salient aspect of the home, then the castle doctrine itself looked like a doctrine that was in effect about abusive husbands and battered wives. The modern castle doctrine thus was rewritten with courts' recognition that violence within the home was the crime to watch.

This recasting entailed the relocation of crime inside the home rather than outside it. The common law view, according to which a man in his home could kill a cohabitant in self-defense without having to retreat, could have allowed a woman who had a right to be in her home to kill a violent husband without having to retreat. The common law, embodied in its most prestigious form, a 1914 Cardozo opinion,[126] had provided a fully developed rationale for a policy outcome that courts in the late 1990s sought to produce.[127] Following Cardozo, it was possible to draw on the "true man" idea

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[119] *Weiand*, 732 So. 2d at 1054.

[120] *See* LENORE WALKER, THE BATTERED WOMAN SYNDROME 86-94 (1984); WALKER, *supra* note 75, at 42–53.

[121] *See Weiand*, 732 So. 2d at 1054 (noting that "a jury instruction on the duty to retreat would reinforce common myths about domestic violence").

[122] *See* State v. Glowacki, 630 N.W.2d 392, 401 (Minn. 2001) (recapitulating arguments of *Gartland* and *Weiand*).

[123] State v. Shaw, 441 A.2d 561, 566 (Conn. 1981).

[124] *Id.*

[125] State v. Thomas, 673 N.E.2d 1339, 1347 (Ohio 1997) (Pfeifer, J., dissenting).

[126] People v. Tomlins, 213 N.Y. 240 (1914).

[127] This has indeed been the judicial reasoning in New York. *See* People v. Jones, 821 N.E.2d 955, 957–58 (2004) ("Although the home exception seems less obvious when the assailant and the defender are members of the same household (and thus, so to speak, share the same castle), we have unwaveringly applied the exception ever since the issue arose 90 years ago in *People v. Tomlins* . . . . We affirm the castle doctrine in its application to occupants of the same household. This has been our decisional law at least since *Tomlins*, and it has particular importance in cases of domestic violence, most often against women.")

and the castle doctrine to empower the battered woman to stand her ground against attack in the home.[128]

But in the cases just discussed, courts opted for a different route. Instead of depicting the common law as supporting their position—the classic posture of judges—feminist-influenced courts depicted the common law as providing a rule contrary to the needs of good public policy. These courts replaced the true man acting within his rights with the subordinated woman unable to retreat. The courts brought to bear a feminist critique to conceptualize violence in the home as subordination rather than intrusion.

This doctrinal turn to subordination saw battered women as specially stripped of autonomy.[129] The battered woman was allowed to kill in self-defense without retreating because, trapped in the dynamics of DV, she lacked the capacity to leave. On this account, derived in its most basic form from a feminist critique of marriage, crime was the creation of a domestic environment in which men oppress, victimize, and sometimes kill women.[130]

If the traditional idea of the true man and the castle doctrine relied fundamentally on the autonomy of a person to stand on his rights, and even to make law for himself in his home, the rationale of permitting a battered woman to kill without retreating was that she *lacked* autonomy.[131] She was

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[128] It must be noted that the true man and the castle doctrine do not provide a good model for defensive killing in a non-confrontational situation, such as when the abuser is asleep or not attacking. Though the cultural image of battered women killing sleeping husbands has been associated with Battered Woman Syndrome, such cases actually constitute a small percentage of cases in which battered women kill their spouses, the vast majority being cases involving confrontations in which women claim they feared imminent harm. *See* Maguigan, *supra* note 87, at 397; Nourse, *supra* note 118, at 1253.

[129] Some feminist scholars have criticized the Battered Woman Syndrome defense as reinforcing negative stereotypes of women. *See, e.g.*, Naomi Cahn, *The Looseness of Legal Language: The Reasonable Woman Standard in Theory and in Practice*, 77 CORNELL L. REV. 1398, 1415–20 (1992); Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121, 137 (1985); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 38–43 (1991); Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195, 197 (1985). *Cf.* Coughlin, *supra* note 87, at 6 ("The battered woman syndrome defense rests on and reaffirms this invidious understanding of women's incapacity for rational self-control . . . . [B]y denying that women are capable of abiding by criminal prohibitions, . . . the defense denies that women have the same capacity for self-governance that is attributed to men, and . . . thereby exposes women to forms of interference against which men are safe.") (footnote omitted).

[130] *See*, *e.g.*, Sheila Cronan, *Marriage*, *in* RADICAL FEMINISM 213, 213–21 (Anne Koedt, Ellen Levine, & Anita Rapone eds., 1973) (describing marriage as slavery); Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, *in* THE LESBIAN AND GAY STUDIES READER 227, 227–54 (Henry Abelove, Michele Aina Barale, David M. Halperin, eds., 1993) (citing the institution of marriage as a tool for male exploitation and domination of women); *see also* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111 (1997) (discussing ways in which the current legal system continues to perpetuate historical inequalities between husbands and wives).

[131] *Compare, e.g.*, FLETCHER, *supra* note 92, at 860–61 (discussing the "absolute right" to defend one's home and personal autonomy) *with* WALKER, *supra* note 75 at 42–54 (1979) (discussing "learned helplessness").

not asserting her rights in a place where she had a right to be. She was, rather, the recipient of the state's protection, a supplicant who had to prove she was disempowered and coerced in order not to be punished for defending her life.

III. The True Woman?

Until very recently only a "slim majority" of states would have been described as generally requiring no duty to retreat before killing in self-defense, and the trend seemed to be moving away from that rule.[132] Since 2005, however, a new trend has emerged.[133] States across the country have passed new self-defense legislation. These new "Castle Doctrine" statutes make several important changes to existing laws governing both self-defense generally and self-defense in the home. In some states, they create a presumption that a home resident who kills an intruder was reasonable to fear bodily harm, even if the intruder does not attack. In even more states, the new laws also reject the general duty to retreat from an attack in public space.

The Castle Doctrine movement is driven by a core image of crime: violent invasion of the home.[134] It harnesses the powerful intuitive appeal of giving ordinary people greater ability to protect themselves and their families from crime. Lawmakers and politicians have championed—and found difficult to oppose—the notion of fighting crime by empowering innocent victims against criminals, particularly at home.[135]

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[132] *See* Dressler, *supra* note 3, § 18.02[C][2] & n.36, at 243; LaFave, supra note 20 § 10.4(f), at 155 (stating the rule of no duty to retreat as the majority view but indicating a "strong minority" view requiring retreat).

[133] *See* Liptak, *supra* note 1.

[134] The fear of violent crime at the hands of an intruder is not simply a reaction to the vicissitudes of crime itself. Violent crime in the United States has declined significantly over the last fifteen years. *See* Bureau of Justice Statistics, U.S. Dep't of Justice http://www.ojp.gov/bjs/glance/viort.htm. Furthermore, the majority of violent crime is by non-strangers. *See* Shannon M. Catalano, Bureau of Justice Statistics, U.S. Dep't of Justice, Publ'n No.214644 Criminal Victimization 9 tbl. 9 (2005) http://www.ojp.usdoj.gov/bjs/pub/pdf/cv05.pdf; *see also* Bureau of Justice Statistics, U.S. Dep't of Justice, Publ'n No. 207846, Family Violence Statistics 9 tbl. 2.2 (2005), http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs.pdf (finding that 73.5 percent of non-fatal violent crimes occurring in or near the home were committed by family members, while 64.9 percent were committed by boyfriends, girlfriends, acquaintances, or strangers).

[135] *See, e.g.*, Editorial, *It Should Be up to Those in Danger to Evaluate the Threat*, Austin American-Statesman, Aug. 19, 2006, at A20 (describing Castle Doctrine laws as "clearly popular with state legislatures, the public, and the National Rifle Association") *available at* http://academic.lexisnexis.com; Alan Gomez, *Florida Democrats Support Pro-Gun Law*, Palm Beach Post, Apr. 5, 2005, at Section A, 1A, *available at* http://academic.lexisnexis.com (quoting Florida Representative Richard Machek saying, "The problem was, if I was voting against it, I was voting against protecting yourself in the home."); Deana Poole, *Deadly Force Bill Moving on a Fast Track*, Palm Beach Post, Mar. 24, 2005, Section A, 14A, *available at* http://academic.lexisnexis.com (quoting Florida State Senator Steve Geller as saying, "Voting against the Castle Doctrine, which is wildly popular and which does make sense . . . would be seen as, 'Those Democrats are

The rapid spread of new Castle Doctrine laws began in 2005 with passage of Florida's Protection of Persons law.[136] According to the National Rifle Association ("NRA"), which lobbied for these laws, the

> Castle Doctrine, in essence, simply places into law what is a fundamental right: self-defense. If a person is in a place he or she has a right to be—in the front yard, on the road, working in their office, strolling in the park—and is confronted by an armed predator, he or she can respond in force in defense of [his or her life].[137]

The NRA stated its intention to use Florida as a model to push for similar laws everywhere else.[138] The NRA characterized itself as "feeding the firebox of Castle Doctrine legislation in states throughout the country, conducting a self-defense whistle stop campaign that is turning [the] focus from criminals' rights to those of the law-abiding who are forced to protect themselves."[139]

A. The Prototype

Florida common law recognized a duty to retreat from an attack if it was possible to do so safely.[140] Like other duty to retreat states, Florida also had a castle doctrine, such that a person was not required to retreat from his

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soft in crime.'"); Kelly Beaucar Vlahos, *Floridians' Self-Defense Rights Expanded*, FoxNews.com, May 3, 2005, http://www.foxnews.com/printer_friendly_story/0,3566,155303,00.html (quoting Florida State Senator Steven Geller as saying, "I hate this bill and I voted for it.").

[136] Florida Protection of Persons Law, Comm. Substitute for S. B. No. 436, Ch. 2005-27 (2005) (enacted) *available at* http://election.dos.state.fl.us/laws/05laws/ch_2005-027.pdf (stating, "This Act shall take effect October 1, 2005. Approved by the Governor April 26, 2005.").

[137] *This Train Keeps a Rollin': Castle Doctrine Sweeps America*, Nat'l Rifle Ass'n Inst. for Legis. Action, (Hereinafter NRA-ILA), July 28, 2006, *available at* http://www.nraila.net/Issues/Articles/Read.aspx?ID=199.

[138] *See* Manuel Roig-Franzia, *Fla. Gun Law to Expand Leeway for Self-Defense; NRA to Promote Idea in Other States*, Wash. Post, Apr. 26, 2005, at A1 *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/04/25/AR2005042501553.html ("NRA Executive Vice President Wayne La Pierre said . . . that the Florida measure is the 'first step of a multi-state strategy' that he hopes can capitalize on a political climate dominated by conservative opponents of gun control at the state and national levels."); *id.* ("'There's a big tailwind we have, moving from state legislature to state legislature,' LaPierre said. 'The South, the Midwest, everything they call "flyover land"—if John Kerry held a shotgun in that state, we can pass this law in that state.'"); *see also* Michelle Cottle, *Shoot First, Regret Legislation Later*, Time, May 9, 2005 *available at* http://www.time.com/time/magazine/article/0,9171,1056283,00.html ("A triumphant NRA has vowed to get 'stand your ground' laws passed in every state. 'We will start with red and move to blue,' LaPierre has declared, adding ominously, 'Politicians are putting their career in jeopardy if they oppose this type of bill.'").

[139] *This Train Keeps a Rollin': Castle Doctrine Sweeps America*, *supra* note 137.

[140] *See* State v. James, 867 So. 2d 414, 416 (Fla. Dist. Ct. App. 2003) ("[T]here is still a Florida common law duty to use every reasonable means to avoid the danger, including retreat, prior to using deadly force.").

own home before using force in self-defense.[141] A person attacked in his home who reasonably feared serious bodily harm could use deadly force without attempting to flee.[142] The new Florida Castle Doctrine law does three things: it expands the circumstances in which the use of deadly force is permitted in the home; it abrogates the duty to retreat in public places; and it creates criminal and civil immunity for people who act in self-defense.

First, in the home, the law creates a presumption (hereinafter "home presumption") that a resident coming upon an intruder who has entered "unlawfully and forcefully" reasonably fears "imminent peril, death or great bodily harm," and is thus permitted to kill the intruder in self-defense.[143] In other words, the presumption is that an unlawful and forceful intruder intends to kill.[144] Any killing of such an intruder is self-defense. A home resident need not show that he feared for his safety. To be sure, Florida previously did not impose a duty to retreat in the home if the home resident reasonably feared for his safety.[145] But the new law goes beyond the common law castle doctrine and allows the home resident to kill the intruder even when there is no actual fear, reasonable or otherwise. This constitutes the most significant accomplishment of the Castle Doctrine law.

Second, outside the home, the law provides that a person attacked "in any other place where he or she has a right to be" has no duty to retreat before killing in self-defense if he or she reasonably believes it is necessary to prevent death, great bodily harm, or a forcible felony.[146] Previously, a person had to attempt to retreat to safety if possible when attacked in a place

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[141] *See* Danford v. State, 43 So. 593, 598 (Fla. 1907); Weiand v. State, 732 So. 2d 1044, 1050 (Fla. 1999) ("Other courts have held that a man is under no duty to retreat when attacked in his own home.").

[142] *Weiand*, 732 So. 2d at 1049 (noting that retreat is not necessary in face of death or great bodily harm).

[143] The law includes "occupied vehicles" in addition to the home. FLA. STAT. ANN. § 776.013(1)(a)(West Supp. 2008).

[144] *Id.* § 776.013(4). Based on the Senate Committee Report, commentators have asserted that the presumption is conclusive and that it cannot be rebutted with evidence. S. Judiciary Comm. 107-436, 2005 Sess., at 6 (Fla. 2005) ("Legal presumptions are typically rebuttable. The presumptions created by the committee substitute, however, appear to be conclusive."); H.R. Judiciary Comm. 107-249, 2005 Sess., at 4 (Fla. 2005); *see also* Michael, *supra* note 7, at 211 (arguing that the conclusive presumption "marks a radical departure from long-held conceptions of proportionality and necessity," and makes the law "a profound departure from common law."); *Florida Legislation—The Controversy Over Florida's New "Stand Your Ground" Law—Fla. Stat. 776.013 (2005)*, 33 FLA. ST. U. L. REV. 351, 355 (2005).

[145] *See* Pell v. State, 122 So. 110, 116 (Fla. 1929) (quoting Allen v. U.S., 164 U.S. 492, 498 (1896), "[A] man violently assaulted in his own house [. . .] is not obliged to retreat, but may stand his ground and such force as [. . .] necessary to save his life or to save himself from great bodily harm."); *Danford*, 43 So. at 596–97 (quoting *Allen*, 164 U.S. at 498).

[146] FLA. STAT. ANN. § 776.013(3) (West Supp. 2008).

other than the home.[147] This is a change from a duty-to-retreat rule to a no-duty-to-retreat rule.[148]

Finally, the law provides immunity from criminal prosecution (including arrest, detention, and charges) and civil action for people who use force in self-defense as permitted by that law.[149] Previously, a person who stood his ground against attack without retreat could have been criminally prosecuted and sued in tort.

The preamble to the Florida law begins by stating that "it is proper for law-abiding people to protect themselves, their families, and others from intruders and attackers . . . ."[150] This initial declaration draws a clear boundary between innocents and criminals who are, respectively, "law abiding people" on the one hand and "intruders and attackers" on the other hand.[151] The law-abiding people—families—are located inside the home, and the criminals are intruders to the domestic scene.

This spatial location is made explicit in what immediately follows: "the castle doctrine is a common-law doctrine of ancient origins which declares that a person's home is his or her castle."[152] The traditional castle doctrine provides the legitimating pedigree for the idea of the criminal as intruder. The language tracks the ideology of the original common law castle doctrine, with emphasis on the protection of the home from outside attack.

Within this context, the preamble then reasons from a basic idea of crime as invasion of private space. First, the intruder violates people's "right to expect to remain unmolested within their homes and vehicles."[153] Homes and vehicles locate us in specific places in which we expect special safety. But then we move to a more general principle: "no person or victim of crime should be required to surrender his or her personal safety to a criminal."[154] The preamble concludes: "nor should a person or victim be required to needlessly retreat in the face of intrusion or attack."[155] This move parallels the way in which the late nineteenth-century true man doctrine

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[147] *See* Hedges v. State, 172 So. 2d 824, 827 (Fla. 1965) (waiver of duty to retreat applies only to one's home).

[148] To establish self-defense, a person would previously have claimed he could not retreat safely; under the new law, he would claim the use of force was necessary to prevent serious harm. In practice it is possible that these arguments may amount to similar things. For a discussion of possible consequences, *see* Anthony J. Sebok, *Florida's New "Stand Your Ground" Law: Why It's More Extreme than Other States' Self-Defense Measures, And How It Got That Way*, May 2, 2005, *available at* http://writ.news.findlaw.com/sebok/20050502.html.

[149] FLA. STAT. ANN. § 776.032 (West Supp. 2008).

[150] *Id.* at Historical and Statutory Notes: Preamble (Laws 2005, c. 2005-27).

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.*

[155] *Id.*

leveraged the ideas associated with the home to extend the rule of no duty to retreat to public space.

In place of the true man theory, however, the preamble gives a hint of the ideological twist to come: it characterizes the person engaged in self-defense as "a person or victim." This alternative formulation (is a victim not a person?) suggests that the drafters of the law draw upon more than one vision of the person who uses force in self-defense. It may be an ordinary person, perhaps a descendant of the true man, or it may be a "victim" – perhaps a woman subjected to abuse inside the home.

The provisions of the Castle Doctrine law itself, entitled "Home protection; use of deadly force; presumption of fear of death or great bodily harm," begins with home intrusion and then extends to self-defense in public space.[156] The law first allows the home resident to kill any unlawful and forceful home intruder.[157] Intrusion into the home, regardless of force, is treated the same as a physical attack that would traditionally justify the use of defensive force. Then, similar to the move of the nineteenth-century true man doctrine, the home serves as leverage to abrogate the duty to retreat in "any other place where he or she has a right to be."[158] Although the true man is not mentioned, framing the self-defense right in the home, the quintessential place where a person has the right to be, leads to a rule of no duty to retreat in public space.

Since 2005, several states have adopted laws markedly similar to Florida's in creating a home presumption against intruders and eliminating the duty to retreat in any other place where a person has a right to be.[159] Other states have adopted laws codifying either a home presumption,[160] or a gen-

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[156] FLA. STAT. ANN. § 776.013.

[157] *Id.* at § 776.013(1).

[158] *Id.* at § 776.013(3).

[159] *See, e.g.*, Alabama (ALA. CODE § 13A-3-23(b) (West 2006 & Supp. 2007)); Kentucky (KY. REV. STAT. ANN. § 503.055(3) (West 2006 & Supp. 2007)); Louisiana (LA. REV. STAT. ANN. § 14:19 (West 2003 & Supp. 2008)); Michigan (MICH. COMP. LAWS SERV. § 780.951 (Lexis 2001 & Supp. 2007)); Mississippi (MISS. CODE ANN. § 97-3-15(e-f) (West 2005 & Supp. 2007)); Missouri (MO. ANN. STAT. §§ 563.031(3), 563.074 (West 1999 & Supp. 2008)); Oklahoma (OKLA. STAT. ANN. tit. 21, § 1289.25(d) (West 2002 & Supp. 2007)); South Carolina (S.C. CODE ANN. § 16-11-440(c) (West 2001 & Supp. 2007)).

[160] *See, e.g.*, Alaska (ALASKA STAT. §§ 09.65.330, 11.81.350(c) (Lexis 2006)); Arizona (ARIZ. REV. STAT. ANN. §§ 13-411, 13-418, 13-419 (West 2001 & Supp. 2007)); Arkansas (ARK. CODE ANN. § 5-2-607(b)(1)(B)(i) (Lexis 2006 & Supp. 2007)); California (CAL. PENAL CODE § 198.5 (West Supp. 2008)); Iowa (IOWA CODE ANN. §§ 704.4 (West 2003 & Supp. 2007)); Massachusetts (MASS GEN. LAWS. ANN. ch. 278, § 8A (West 1998 & Supp. 2007)); Minnesota (MINN. STAT. ANN. § 609.065 (West 2003 & Supp. 2007)); Missouri (MO. ANN. STAT. §§ 563.031, 563.074 (West 1999 & Supp. 2008)) (general presumption against duty to retreat from a dwelling or residence if not unlawfully entering or unlawfully remaining); North Dakota (N.D. CENT. CODE §§ 12.1-05-07.2(c) (Lexis1997 & Supp. 2007)); Texas (TEX. PENAL CODE ANN. §§ 9.31-32 (2007)); West Virginia (S. 31, 78th Leg., 2nd Reg. Sess. (W. Va. 2008)) (amending W. VA. CODE § 55-7-22 (2008)); Wyoming (H. 137, 59th Leg., 2008 Budget Sess. (Wyo. 2008)) (amending WYO. STAT. ANN § 6-2-602 (2008)).

eral rule of no duty to retreat,[161] or more idiosyncratic provisions.[162] Though at least eight states have had proposals for laws that were abandoned, stalled, or blocked,[163] many more currently have live bills that could still be passed.[164]

B. The New Castle Doctrine

1. *True Men and Victims*

Advocates of the new Castle Doctrine laws have leveraged the idea of the home into a self-defense right in any place where a person has a right to be. The abrogation of the duty to retreat in public space is thus cast as an entailment of the traditional castle doctrine. But the image of the home resident today is not simply that of the nineteenth-century true man. The new Castle Doctrine laws synthesize the true man and the subordinated woman of late twentieth century legal feminism into a new figure of self-defense that I call the "true woman."

Rhetoric among supporters of the Castle Doctrine laws has consistently focused on the home as the core imaginative location of self-defense. As the NRA put it, "This law is about affirming that your home is your castle, and, in Florida, you have a right to be absolutely safe inside its walls."[165] Ohio state senator John Carey described his support for an Ohio Castle Doctrine law based on the following scenario:

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[161] These states include: Georgia (GA. CODE ANN. § 16-3-23.1 (2007)); Indiana (IND. CODE ANN. § 35-41-3-2(a)(2) (West 2004 & 2007)); Kansas (KANS. STAT. ANN. §§ 21-3211(c), 21-3212(c), 21-3218 (West 2005 & Supp. 2006)); Montana (MONT. CODE ANN. § 45-3-103 (2005)); South Dakota (S.D. CODIFIED LAWS § 22-18-4 (Supp. 2007)).

[162] Rhode Island, for example, provides that the duty to retreat is only waived if the deadly violence was used against intruders engaged in the offense of breaking and entering, R.I. GEN. LAWS § 11-8-8 (2007).

[163] *See, e.g.*, Colorado (H.R. 1011, 66 Gen. Assemb., 1st Reg. Sess. (Colo. 2007) (postponed indefinitely)); Minnesota (H.F. 498, 85th Leg., Reg. Sess. (Minn. 2007) (defeated in Committee)); New Hampshire (S. 318, 2005 Leg., 159th Sess. (N.H. 2006) (vetoed by Governor)); New Mexico (H. 163, 2007 Leg., 48th Sess. (N.M. 2007) (postponed indefinitely)); Virginia (H. 1626, 2007 Leg., Reg. Sess. (Va. 2007) (defeated in Committee)); Washington (H. 3065, 59th Leg., 2006 Reg. Sess. (Wash. 2006) (no action since Jan. 2006)).

[164] *See, e.g.*, Connecticut (H. 6072, 2007 Gen. Assemb., Jan. Sess. (Conn. 2007)); Hawaii (S. 1787, 24th Leg., Reg. Sess. (Haw. 2007)); Maryland (S. 449, 2008 Gen. Assemb., 425th Sess. (Md. 2008)); Massachusetts (S. 804, 185th Leg., Gen. Ct. (Mass. 2007)); New Jersey (Assemb. 159, 213th Leg., 1st Sess. (N.J. 2008); New York (Assemb. 8182A, 2007–2008 Gen. Assemb., Reg. Sess. (N.Y. 2007)); North Carolina (H. 476, 2007-2008 Gen. Assemb., Reg. Sess. (N.C. 2007)); Ohio (S. 184, 127th Gen. Assemb., 2007–2008 Reg. Sess. (Ohio 2007)); Oregon (S. 658, 74th Leg. Assemb., 2007 Reg. Sess. (Or. 2007)); Pennsylvania (S. 1173, 191st Gen. Assemb., 2007–2008 Reg. Sess. (Pa. 2007)); Tennessee (S. 1065, 105th Gen. Assemb., Reg. Sess. (Tenn. 2007)); and Wisconsin (Assemb. 35, 2007–2008 Leg., Reg. Sess. (Wis. 2007)).

[165] *Gov. Bush Signs Florida's New "Castle Doctrine" Self-Defense Law*, NRA-ILA, Apr. 26, 2005, http://www.nraila.org/News/Read/NewsReleases.aspx?ID=5685.

> Imagine being in your own home, sound asleep in your own bed. Suddenly, you wake up to an unfamiliar noise. As you stumble to turn on the light, you find that a stranger has forcibly entered your home, potentially to harm you or your family. There is a natural instinct that when someone is jeopardizing the well-being of you and your family, you will take every measure available and necessary to protect your loved ones and your home, even if it results in serious physical harm or death to yourself or the intruder.[166]

The true man ideal of the man protecting his home and family is on full display.

Home intrusion is the self-defense archetype that informs the right to stand one's ground in other places: "Law-abiding citizens should not be victimized by the state/courts for failing to retreat (RUN) from their own property or any place they have a right to be in the face of attack by an unlawful intruder."[167] But the mechanism of the extension here is different. If the nineteenth-century true man ideal leveraged the protection of the home and family to expand self-defense in public space, today what is also being leveraged is a victimhood that draws on the subordinated woman theory of self-defense.

Indeed, law-abiding citizens are not only victimized by crime but are also victimized by the very law requiring retreat: "The courts in Florida had moved our self-defense laws to a posture of protecting criminals and when the laws protect the criminals instead of victims and law-abiding citizens, it's time to do something about it."[168] The new laws are portrayed as remedying a state of affairs in which the law has been on the wrong "side": "Existing law is on the side of the criminal. The new law is on the side of the law-abiding victim."[169] As put by Marion Hammer, the first female president of the NRA: "Your home is your castle, and you have a right—as ancient as time itself—to absolute safety in it. Florida law is now on the side of the law-abiding victims rather than criminals. And that is the way it is supposed to be."[170]

What is this notion of a double victim, a victim of violence and of the law itself? It is difficult to avoid the implication that the victim imagined here is the woman subjected to repeated abuse in the home until the law comes in and takes her side—in the familiar locution, a DV victim. She is also the victim of laws that required her to flee from her own home instead

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[166] Sen. John Carey, *Bill Improves Ohio's Right to Self-Defense*, TIMES-GAZETTE, Apr. 18, 2006, *available at* http://timesgazette.com/print.asp?ArticleID=138362&SectionID=1&SubSectionID=1.

[167] *Florida - HB-249/SB-436 "Castle Doctrine" Bills Pass*, NRA-ILA Feb. 24, 2005, http://www.nraila.org/Legislation/Read.aspx?id=1392.

[168] Vlahos, *supra* note 135 (quoting NRA President Marion P. Hammer).

[169] NRA-ILA, *supra* note 167.

[170] Marion P. Hammer, *At Last, Balance Shifts Away from Criminals*, ATLANTA JOURNAL-CONSTITUTION, May 2, 2005, at A11.

of standing her ground. The notion of women as subordinated to a "male" legal regime is a familiar and indeed central trope of legal feminism.[171] From the recognition of women as victims of the legal system grows the feminist aspiration to move the law to the side of women. The Castle Doctrine advocates adopt this imagery to justify the new laws: If previous law was located on the "side" of the criminal, it will now move to the side of the victim by enabling her to defend herself without retreating.

The idea of the victim is then leveraged to render the self-defense right mobile. The victim is imagined to carry the status of victim around with her. The law is on her side of the boundary wherever she has a right to be. The castle doctrine principle that intruders enter the home at their peril becomes "the notion that enemies invade personal space at their peril."[172] Just as the idea of the man protecting his home and family was leveraged in the nineteenth century to expand the no-duty-to-retreat rule to public space, here the idea of the female victim who needs protection from a man is leveraged for the same purpose.

2. *Battered Women*

Violence against women has played a pronounced role in the discourse surrounding the Castle Doctrine laws. The new laws have been described as being protective of women, designed to enable women to defend themselves against men, and specifically to remedy the disability that the prior law placed on women's ability to protect themselves from male violence. Marion Hammer, the conceiver of the new self-defense law, promoted it in these expressly gendered terms:

> [A] woman is walking down the street and is attacked by a rapist who tries to drag her into an alley. Under prior Florida law, the woman had a legal "duty to retreat." The victim of the attack was required to try to run away. Not anymore. Today, that woman has no obligation to retreat. If she chooses, she may stand her ground and fight.[173]

Tellingly foregrounding rape as the relevant violent crime, Hammer portrays the duty to retreat as harmful to women. As she put it, "You can't expect a victim to wait and ask, 'Excuse me, Mr. Criminal, are you going to rape me and kill me, or are you just going to beat me up and steal my television?' "[174]

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[171] *See, e.g.*, CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 161–62 (Harvard Univ. Press 1989) ("The state is male in the feminist sense: the law sees and treats women the way men see and treat women.").

[172] Roig-Franzia, *supra* note 138.

[173] *Florida - HB-249/SB-436 "Castle Doctrine" Bills Pass*, *supra* note 167.

[174] Alisa Ulferts, *Bill Would Paint Targets on Backs of Intruders*, ST. PETERSBURG TIMES, Feb. 10, 2005 at 1B, *available at* http://pqasb.pqarchiver.com/sptimes/access/791639691.html?dids=791639691:791639691&FMT=FT&FMTS=ABS:FT&date=Feb+10%2C+2005&author=ALISA+ULFERTS&pub=St.+Petersburg+Times&edition=&

Her reasoning is both protective of women as victims and focused on their rights and autonomy. In it, recognition of a victim's right to "stand her ground and fight"[175] like a true man coexists with the view that we "can't expect a victim"[176] to retreat. In other words, her right to stand her ground and her subordinated status go hand in hand.

Indeed, Hammer tells her own personal story about defending herself from rape by six men in a parking garage: "I know they had gang rape in mind. . . . They were obviously drunk, and I think I would have been raped and killed if I hadn't had my gun with me. . . . My Colt was an equalizer in that situation."[177] The story exemplifies a project to feminize the NRA's message through the linking of gun ownership with protection against male violence. The project embraces feminine as well as feminist rhetoric: "Being able to protect yourself is an emotional issue. Rape and murder and kidnapping are emotional issues."[178]

Sandra Froman, the most recent woman president of the NRA, traces her own "love affair with guns — or, more specifically, with what she feels is her constitutional right to own guns," to an incident in which a man attempted to break into her house.[179] Neither the neighbors nor the police came when she called, and she "realized [she] had to take responsibility for [her] own personal safety."[180] "I decided I wasn't going to be a victim, so that's when I learned how to shoot."[181] The moral that Froman draws from this story combines the fear of home intruders with the standard legal feminist story of law enforcement unresponsiveness to women victims of violence. The failure of the state to monopolize violence leaves women vulnerable, so women must be empowered to use violence: "A lot of women are led to believe they are too weak or too stupid to own guns . . . . Part of my job is to let women know that it's an option for them."[182] The project becomes the empowerment of individual women, through strong self-de-

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startpage=1.B&desc=Bill+would+paint+target+on+backs+of+intruders and http://academic.lexisnexis.com.

[175] *Florida - HB-249/SB-436 "Castle Doctrine" Bills Pass*, *supra* note 167.

[176] Ulferts, *supra* note 174.

[177] Merrie Skinner, *Pistol-Packing Growing Quickly for Women Alone,* New Orleans Times Picayune, Sept. 9, 1990, at A2.

[178] Dara Kam, *Gun Proposal to Trigger Clash over Rights*, Palm Beach Post, Feb. 25, 2006, *available at* http://www.palmbeachpost.com/search/content/info/research.html.

[179] Scott Gold, *Woman Is Poised to Lead the NRA*, L.A. Times, Apr. 15, 2005, at A21.

[180] Joe Burchell, *Tucson Lawyer Puts Woman's Touch on NRA*, Ariz. Daily Star, May 3, 2003 at A1, *available at* http://nl.newsbank.com/nl-search/we/Archives?s_site=azstarnet&f_site=azstarnet&f_sitename=Arizona+Daily+Star%2C+The+%28AZ%29&p_theme=gannett&p_product=ADSB&p_action=search&p_field_base-0=&p_text_base0=Tucson+Lawyer+Puts+Woman%27s+Touch+on+NRA&Search=Search&p_perpage=10&p_maxdocs=200&p_queryname=700&s_search_type=keyword&p_sort=_rank_%3AD&p_field_date-0=YMD_date&p_params_date-0=date%3AB%2CE&p_text_date-0=; *see also* Gold, *supra* note 179 at A21.

[181] Burchell, *supra* note 180.

[182] *Id.*

fense, in the face of law enforcement neglect of violence against women.[183] The new Castle Doctrine's elimination of the duty to retreat is framed as a move in this empowerment project.

But the concern that getting rid of the duty to retreat would turn homes into places where familial disputes lead to homicide motivated an important limitation on the home presumption. In what Hammer describes as a "compromise," the law

> attempts to say that if in a domestic violence situation you are being beaten you may use self-defense, but you can't simply take action against an estranged spouse who breaks into the home if they own the home. You have to be under attack before you use force in those situations. There was an effort by some of the attorneys on the Justice Committee to try to be sure that in restoring your self-defense rights and your right to protect your home that they did not set up scenarios where people could murder people they did not like and claim it was lawful self-defense.[184]

The concern calls to mind the anxiety about "High Noon" in the familial kitchens of the state, which arose at the thought of wives empowered to kill their husbands.[185] Here, curtailing the home presumption in family situations is quite consistent with the reasons for favoring a cohabitant exception to the castle doctrine.

Notwithstanding the usefulness of the female victim to underwrite the general expansion of the no-duty-to-retreat rule, the new Castle Doctrine stops short of allowing a woman in her home always to use deadly force in self-defense without retreat. The Florida law, for example, explicitly addresses the scenario of violence within the home and has been followed in that respect by a number of states.[186] It provides that the home presumption does not apply if "the person against whom the defensive force is used has

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[183] The feminization of the NRA's image has also proceeded through the linking of traditional women's interest in cooking with the male activity of hunting. *See id.* (Froman's description of a monthly publication called Woman's Outlook which focuses on "shooting and hunting from a woman's perspective, including women's clothing styles, recipes, and 'what wine to serve with the duck you just shot' "); Gold, *supra* note 179 (describing Froman as "an avid hunter" who "is frequently searching for new recipes she can use to cook her prey.").

[184] Center for Individual Freedom, *Former NRA President Exposes the Lies and Misinformation Aimed at Florida's Castle Doctrine Law* http://www.cfif.org/htdocs/freedomline/current/in_our_opinion/marion-hammer-nra-interview.htm (2005).

[185] *See* State v. Shaw, 441 A.2d 561, 566 (Conn. 1981).

[186] *See, e.g.*, Alabama (ALA. CODE § 13A-3-23(a)(4)(a) (West 2006 & Supp. 2007)); Arizona (ARIZ. REV. STAT. ANN. §§ 13-411 (Declaration of Policy) (West 2001 & Supp. 2007)); Arkansas (ARK. CODE ANN. § 5-2-607(a)(3) (Lexis 2006 & Supp. 2007))); Kentucky (KY. REV. STAT. ANN. § 503.055(2)(a) (West 2006 & Supp. 2007))); Michigan (MICH. COMP. LAWS § 780.951(2)(a) ((Lexis 2001 & Supp. 2007))); North Dakota (N.D. CENT. CODE §§ 12.1-05-07.1(3)(a) (Lexis1997 & Supp. 2007))); Oklahoma (OKLA. ST. ANN. tit. 21, § 1289.25(C)(1) (West 2002 & Supp. 2007)); Wyoming (H. 137, 59th Leg., 2008 Budget Sess. (Wyo. 2008)) (amending WYO. STAT. ANN § 6-2-602 (2008)).

the right to be in or is a lawful resident of the dwelling . . . and there is not an injunction for protection from domestic violence . . . against that person."[187]

Accordingly, if both people reside in the home, the home presumption does not apply. In the familial situation, in other words, the law puts the defender at home in the same position as she would be in any other place where she has a right to be, not a better position. She certainly has no duty to retreat from the home if physically attacked there, but nor is she allowed to presume that the cohabitant poses a danger to her. To be justified in killing the cohabitant in self-defense, her fear of being imminently killed or seriously harmed must be reasonable.

But, as we know, not applying the home presumption to cohabitants can disadvantage DV victims. Thus the new law does specify one way to have the home presumption apply in DV situations: through the legal mechanism of a DV protection order. If a protection order commands a person to stay away, he can be killed when he forcefully enters the home, without any other evidence to establish fear or danger.[188] That person, the domestic abuser, can be treated just like a home intruder when he enters. He can be shot on sight.

C. Subordinated Woman as True Man

Some Castle Doctrine supporters have expressed the view that DV victims "should be cheered by the legislation" and "should see the legislation as working in their favor."[189] But an obvious worry is that in general, laws that are more permissive of violence, even for self-defense purposes, increase dangers to DV victims.[190] Specifically, by easing the duty to retreat, the new laws may make it easier for abusers themselves to claim self-defense and avoid conviction.[191] The Brady Campaign to Prevent Gun Vio-

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[187] FLA. STAT. ANN. § 776.013

[188] *Id.* Some Castle Doctrine statutes, however, do not have this provision. *See, e.g.*, Alaska (ALASKA STAT. §§ 09.65.330, 11.81.350(c) (Lexis 2006)); California (CAL. PENAL CODE § 198.5 (West Supp. 2008)).

[189] Howard Fischer, *Self-Defense Gun Bill Goes to Napolitano*, ARIZ. DAILY STAR, Apr. 20, 2006, at A1 (characterizing views of Arizona Senate Majority Leader Timothy Bee). http://www.legislature.mi.gov/documents/2005-2006/billanalysis/Senate/htm/2005-SFA-1046-E.htm (stating "Also, prosecutors and a representative of the domestic violence prevention and treatment board raised concerns about domestic abusers' being able to claim their actions were in self defense.").

[190] As the Brief for Petitioner in District of Columbia v. Heller stated, "all too often, in the heat of anger, handguns turn domestic violence into murder." Brief of Petitioner at 52, District of Columbia v. Heller, No. 07-290, 2008 WL 695617 (Mem) (S.Ct. Jan. 4, 2008). *See also* Brief of National Network to End Domestic Violence, et al. at 18, District of Columbia v. Heller, No. 07-290, 2008 WL 695617 (Mem) (S.Ct. Jan 11, 2008) (arguing that "[h]andguns empower batterers and provide them with deadly capabilities, exacerbating an already pervasive problem").

[191] *See* Matthew Benson, *New Law Bolsters Self-Defense Rights*, ARIZ. REPUBLIC, Apr. 25, 2006, *available at* http://localsearch.azcentral.com/sp?catId=&aff=1100&searchkeyword=&searchcategory=*&keywords=New+Law+Bolsters+Self-Defense+Rights&advkeywords=& address=; Chris Christoff, *Self-Defense Shooters Get House*

lence expressed the concern that "the law will be abused to defend people who shoot in the emotional rage that often accompanies domestic violence . . . ."[192] Democratic senator Paula Aboud, the lone Arizona senator to vote against that state's Castle Doctrine law,[193] did so out of concern that the law "could end up working against victims of domestic violence."[194]

The influence of DV is present in the provision specifying that the home presumption, which ordinarily does not apply to family situations, *does* apply when there is a DV protection order in effect. When Michigan passed its Castle Doctrine law, Governor Jennifer Granholm, the first female governor of Michigan, insisted on provisions that would "ensure that domestic violence victims aren't prosecuted for acts of self-defense."[195] DV groups in Arizona, for example, also successfully sought an amendment that addressed DV.[196]

Thus, the means by which lawmakers addressed DV concerns was via the formal tool of the DV protection order. The new laws attempt to take

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Boost; New Measures Extend Immunity, DETROIT FREE PRESS, Apr. 20, 2006, at 1 (including the Michigan Domestic Violence Control Board in list of those unhappy with the law); Fischer, *supra* note 189 (quoting Arizona Senate Majority Leader Tim Bee "Bee acknowledged that groups who advocate for domestic-violence victims were concerned this would allow an abusive spouse to kill a mate and claim self-defense, leaving police and prosecutors unable to prove otherwise. He acknowledged that could make getting a conviction more difficult."); Editorial, ATLANTA JOURNAL-CONSTITUTION, Jan. 17, 2006, at 8A (quoting Alice Johnson, director of Georgians for Gun Safety; "The implications are enormous: domestic violence situations, disgruntled employees who are suffering from mental illness"); Defense of Self & Others S. 85 and H. 5142, 5143, 5153, & 5548, General Assemb., Reg. Sess. (Mich. 2006): Enrolled Analysis Before Senate Fiscal Agency (2006), www.legislature.mi.gov/documents/2005-2006/billanalysis/Senate/htm/2005-SFA-1046-E.htm (stating: "Also, prosecutors and a representative of the domestic violence prevention and treatment board raised concerns about domestic abusers' being able to claim their actions were in self-defense."); Maricopa Association of Governments Regional Domestic Violence Council, Strategic Planning Minutes, April 26, 2006, at 12 (stating: "In a DV scenario, if an abuser shoots and kills their partner, the perpetrator could say that he/she was acting in self-defense."); Final Staff Summary of Meeting Before Colorado House Committee on Judiciary, 65th General Assemb., 2d Reg. Sess. (Colo. 2006) ("Annmarie Jensen, representing the Colorado Association of the Chiefs of Police and the Colorado Coalition Against Domestic Violence, spoke in opposition to the bill. While the organizations support the concept of self-defense, they feel it expands self-defense to include force that may not be used judiciously.").

[192] Mary Ellen Klas, *Group Opposed to New Gun Law Targets Tourists*, Miami Herald, Sept. 23, 2005, *available at* https://verify1.newsbank.com/cgi-bin/ncom/MH/.

[193] ARIZ. REV. STAT. ANN. § 13-411 (Supp. 2007).

[194] Fischer, *supra* note 189, at A1.

[195] Gary Heinlein, *Lawmakers Pass Bill Allowing Deadly Force*, DETROIT NEWS, June 30, 2006, at 3B, *see also* Chris Christoff, *Self-Defense Shooters Protected: Granholm Signs Legislation Amid Spat*, DETROIT FREE PRESS, July 21, 2006, *available at* https://verify1.newsbank.com/cgi-bin/ncom/FP/ (reporting that Granholm "forced changes in the bill, such as protecting victims of domestic assault . . . .").

[196] *See* Maricopa Ass'n of Gov'ts Regional Domestic Violence Council, Strategic Planning Minutes, April 26, 2006, at 12; Comm. on the Impact of Domestic Violence and the Courts, Minutes, Feb. 8, 2006, at 3, http://www.supreme.state.az.us/cidvc/Minutes/Min020806.pdf ("The problem is that [the Castle Doctrine bill] currently excludes people who are named on the lease or title, even when they have an Order of Protection against them. They are going to add language to address domestic violence situations.").

account of the murkiness of family disputes and attempt to discourage a resort to violence in familial circumstances. But the existence of a protection order issued by the state can cut through the ambiguity and provide a bright-line method for distinguishing DV from other family disputes, crimes from feuds, and criminals from victims.[197]

The protection order situates the parties inside the DV category and indicates that one party in the home – the DV victim — can kill without retreating. The law accomplishes this by moving DV itself from the category of within-the-home dispute into the category of home intrusion.[198] The protection order excludes the abuser, makes his presence unlawful, and makes him a legal stranger to the home. Then, under the home presumption, he can be shot if he enters the home.

Furthermore, the practical import of the home presumption is actually intensified by the DV provision. Violence among family members is far more prevalent than the kinds of home intrusions imagined by the Castle Doctrine movement.[199] And as I have discussed elsewhere, DV protection orders have become increasingly common legal tools, routinely granted, and often issued ex parte or even without the victim's request.[200]

The importance of this move for understanding the rhetorical and ideological components of the development of self-defense law cannot be overstated. On the one hand, the new Castle Doctrine laws reemphasize the ideas of crime as crossing the boundary into the home, the intruder as the paradigmatic criminal, and the true man protecting his home and family. On the other hand, the laws simultaneously rely on notions of crime as subordination in the home, the domestic abuser as criminal, and the female as a victim of male violence.

Synthesis of these apparently different visions lies in the way that the DV protection order transforms the man in his home into an intruder to the home. By rendering him a legal stranger, the protection order allows us to imagine his crime as intrusion while still retaining a framework of female subordination in the home. Then the woman who kills the abuser-intruder emerges as a kind of "true woman," exercising her common law right to

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[197] *Cf.* Fischer, *supra* note 189 (quoting Arizona Senate Majority Leader Timothy Bee, "Oftentimes in cases of domestic violence there's history of domestic violence that's already recorded . . . . You've got orders of protection, you have prior police reports . . . . And I believe in those cases that evidence will be introduced and that those people will be prosecuted.").

[198] *See* Suk, *supra* note 11, at 22 (arguing that within burglary law there has been "a legal reimagination of DV" as the "archetypal crime of home invasion").

[199] *Cf.* sources cited, *supra* note 134. Lawmakers often referred to the bill as empowering homeowners to defend against violent home invasions, but less often expounded on its arguably more frequent future use in scenarios of ordinary domestic violence.

[200] *See* Suk, *supra* note 11 (discussing criminal courts' routine issuance of protection orders upon arrest for misdemeanor DV).

defend the castle and her constitutional right to bear arms[201]—but doing so specifically as a victim rather than a true man.

The DV protection order has become an important means of consensus for the disparate interests in the debate. The NRA and lawmakers supportive of the new Castle Doctrine can point to the protection order provision as a hallmark of the law's woman-protective purpose. DV-oriented skeptics of expansion of permission to use violence are assured that where the parties are officially categorized into the abuser-victim dyad by a protection order, the law permits victims to defend themselves and makes it difficult for abusers to claim self-defense. The protection order thus functions as a useful tool of compromise.[202]

On the one hand, the Castle Doctrine laws reinscribe crime as intrusion. A man's home is his castle, and he defends his family there; and by extension, as a true man, he may defend himself wherever he has a right to be. But on the other hand, the new laws and their surrounding discourses also bear the traces of a different, subordination model of crime that has developed in the law of self-defense in tandem with our law's DV consciousness. The home is the place where a woman is abused. She may treat the abuser like an intruder to the home. This is repetition of the true man with a difference—the true woman.

The protection order in the new Castle Doctrine marks the abuser not merely for arrest but for killing. The subordination critique of the intrusion model of crime is nested within a true man frame. The rhetorical focus on the home today both reinscribes and revises the true man ideal by re-imagining violence within the home as intrusion. Even as the concept of the home as a man's castle is invoked and promoted in modern self-defense law, violence within the home becomes the focus. The idea of defending families in their homes against intruders morphs into talk of protecting women from DV. The intense effort to reinforce the boundary that the home represents ends up underscoring the extent to which the strength of that boundary has eroded in our conception of crime.

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[201] *See* Brief of Amicus Curiae 126 Women State Legislators and Academics in Support of Respondent at 2, WL 383523, District of Columbia v. Heller, No. 07-290, 2008 WL 695617 (Mem) (S.Ct. Feb. 8, 2008) (arguing that the D.C. gun ban impairs women's ability to protect themselves and their children against male violence in the home).

[202] Even beyond the Castle Doctrine laws, the protection order proves useful for assimilating DV concerns into the rhetorical and policy goals of pro-gun interests. In Pennsylvania, pending legislation would allow anyone who receives a DV protection order to receive a temporary emergency license to carry a concealed firearm. *See* Pennsylvania (S. 1173, 191st Gen. Assemb., 2007–2008 Reg. Sess.) (Pa. 2007); Kate Monaghan, *Gun License for Domestic Violence Victims "Dangerous," Group Says*, CNSNEWS.COM, http://www.cnsnews.com/ViewNation.asp?Page=/Nation/archive/200610/NAT20061006a.html (last visited April 20, 2008). A law allowing DV victims to receive a temporary gun permit upon showing proof of issuance of a protection order already exists in North Carolina. North Carolina (N.C. S. 343) (2005) (codifying H.B. 1311).

Epilogue

The most important contemporary developments in the law of self-defense manifest an extraordinary degree of interest in the relation between the home and violent crime. I have interpreted this latest era of self-defense law in the context of previous major developmental epochs which, I have argued, were centrally shaped by concepts of the home, and in particular, by gender expectations therein. But understanding the current focus on the home in self-defense law as the latest intervention in a series of attempts to conceptualize crime in relation to the home still prompts the question why the home preoccupation in American law feels so pronounced and urgent today.

One wonders whether the legal trend is related in part to the rise, since September 11, 2001, of a range of rhetoric and ideas about the use of force, including preemptive force, in defense of what is now often called our "homeland." In the words of one writer, "what used to be called 'the home front' is now the actual front, and we have to comport ourselves with a degree of courage on this new front line."[203] In a period when it is difficult to be confident about defending ourselves against attack by foreigners from outside our borders, perhaps there is a displacement of the project of self-defense from the foreign terrorist onto the ordinary criminal.[204] If we cannot be sure of stopping terrorism on our soil, at least we can shore up confidence in fighting crime in each of our own homes.[205]

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[203] William Safire, *On Everyday Bravery*, N.Y. Times, Oct. 11, 2001, at A25. *See also* Nancy Harvey Steorts, Safe Living in a Dangerous World, An Expert Answers Your Every Question from Homeland Security to Home Safety (2003) (providing advice to Americans on remaining safe in today's world); David E. Sanger, *A Nation Challenged: The White House*, N.Y. Times, Nov. 4, 2001, at B7, *available at* http://query.nytimes.com/gst/fullpage.html?res=9C00EFDB1739F937A35752C1A9679C8B63&scp=6&sq=%29%3B+David+E.+Sanger%2C+A+Nation+Challenged%3A+The+White+House%2C+N.Y.+Times%2C+Nov.+4%2C+2001+at+Section+B%3B+Column+1%3B+National+Desk%3B+Pg.+7&st=nyt (quoting Vice President Cheney suggesting that "for the first time in our history, we will probably suffer more casualties here at home in America than will our troops overseas").

[204] An interesting counterpoint exists in Bill Stuntz's observation that the war on terrorism after September 11, 2001, which led to increased demands on law enforcement, affected local law enforcement's ability to deal with more typical crime, which generates calls for greater police power to catch criminals. *See* William J. Stuntz, *Local Policing After the Terror*, 111 Yale L.J. 2137, 2138–40 (2002). My observations here are on the meaning rather than the cause of self-defense laws, but one wonders whether there is a complementary story of political economy in which the war on terror that leads to calls for greater police authority also leads to calls for broader self-defense laws for law-abiding citizens.

[205] Homeland security has come home in the form of "homeland security kits," *see* Regional Environmental Hazard Containment Corporation, http://www.rehcc.com/Home Land_Security_Recommendation.htm (last visited April 22, 2008); Department of Homeland Security, http://www.ready.gov/america/getakit/index.html (last visited April 22, 2008) (suggested items for an emergency kit include "whistle to signal for help" and "dust mask, to help filter contaminated air and plastic sheeting and duct tape to shelter-in-place"), and Homeland Security cameras intended to protect against home invasions, see Amazon.com, http://www.amazon.com/Homeland-Security-00897-Wireless-Weather proof/dp/B000246T5O/ref=sr_1_2/105-2349014-1325237?ie=UTF8&s=hi&qid=1185

The association of the law of self-defense with the project of national self-defense is not without precedent. The castle doctrine itself, as I suggested at the outset, takes as its central metaphor a defensive technology—the castle—which protected not merely the private house, but the realm. There is something appealing and perhaps poignant about the assertion that a man's home is his castle after fortress America has been breached in such a devastating and public way.

Indeed, the relation between the home and the nation has been long central to the definition of self-defense. We can recall Hale's juxtaposition of "hostility between two nations" and "assaults and affrays between subjects under the same law,"[206] or Blackstone's gloss on Locke's proposal that "force without right upon a man's person puts him in a state of war with the aggressor."[207] The metaphor of war and foreign territorial invasion has continued to persist in thinking about self-defense.[208] Characterizing attack by one person on another as "the unilateral violation of the defender's autonomy," George Fletcher explains:

> If a person's autonomy is compromised by the intrusion, then the defender has the right to expel the intruder and restore the integrity of his domain. The underlying image is that of a state of warfare. An aggressor's violation of our rights is akin to an intrusion of foreign troops on our soil. As we are inclined to believe that any community has the absolute right to expel foreign invaders, any person attacked by another should have the absolute right to counteract aggression against his vital interests.[209]

The connection between self-defense against criminals and national security has explicitly been remade in recent political and legal discourse.[210] For example, State Representative Daryl Metcalfe, sponsor of a Penn-

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418170&sr=8-2 (last visited April 18, 2008) ("Homeland's Security Camera System. Keeps People and Property Safe from Harm. Homeland's exciting new line of security cameras and systems provide maximum protection for people and property. In an era where vigilance is more important than ever, Homeland answers the call to duty.").

[206] HALE, *supra* note 14, at 481.

[207] BLACKSTONE, *supra* note 8, at 181.

[208] *See, e.g.*, Kimberly Kessler Ferzan, *Defending Imminence: From Battered Women to Iraq*, 46 ARIZ. L. REV. 213 (2004) (exploring parallels between self-defense arguments for the Iraq war and self-defense claims of battered women).

[209] FLETCHER, *supra* note 92, at 860.

[210] *See, e.g.*, Brief of the National Rifle Association at 1, District of Columbia v. Heller, No. 07-290, 2008 WL 695617 (S. Ct. Feb. 4, 2008) (arguing that upholding the D.C. gun ban "would cause grave harm not only to the tens of millions of law-abiding Americans who keep and bear arms for self-defense and other lawful, private purposes, but to the entire nation, which in times of gravest peril has always relied upon the body of ordinary men and women, and their everyday familiarity with arms, for its security."); Brief of Respondent at 56, No. 07-290, District of Columbia v. Heller, No. 07-290, 2008 WL 695617 (S. Ct. Feb. 7, 2008) ("As our Nation continues to face the scourges of crime and terrorism, no provision of the Bill of Rights would be immune from demands that perceived governmental necessity overwhelm the very standard by which enumerated rights are secured.").

sylvania bill to provide DV victims with emergency guns – another expression of the strange crossroads of feminism and the NRA – sees "not only a direct connection between protecting oneself with a firearm and the prevention of domestic abuse, but also a link to national security."[211] According to Metcalfe, self-defense "is one of the deterrents that terrorists have to have . . . . They must be cognizant of the potential defense that an American citizen can provide for themselves and their families, as a terrorist does seek to do harm to our American citizens."[212] Thus, arming DV victims with guns "is a defense against a national security problem that we see in terrorism."[213]

We can see here not only the connection made between armed self-defense and the policy against DV, similar to those made by former NRA presidents Hammer and Froman, but also the analogous comparison of citizens' protection of their homes and families to the protection of the homeland from foreign terrorists. Intrusion frames the meaning of DV. Homeland security frames the meaning of home security.

I have suggested that even as the idea of invasion appears to motivate the new Castle Doctrine, the notion of subordination in the home has come to the fore. I have also suggested a cultural link between the threat of terrorism and the temporally concurrent rise of the new Castle Doctrine. If I am right, perhaps our desire to reclaim the capacity to defend manfully against criminal intruders in the home reflects a fantasy that by becoming true men again we can beat back threats from the most public to the most private, both foreign and domestic. At the same time, we inherit a legal discourse of self-defense today spoken not in the language of the true man but the hybridized language of the true woman.

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[211] Monaghan, *supra* note 202.
[212] *Id.*
[213] *Id.*